

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

CNR No. : 04-000220-2017
Registration No. : 18/2017
Case No. : 46-I/2017 / 19-III/2017
Presented on : 20.02.2017
Decided on : 25.07.2018

Dhandev son of Shri Shyam Singh, resident of Village Balyandha, Post Office
Lambathach, Tehsil Thunag, District Mandi, H.P.

.....Complainant.

Versus

Devinder Singh son of Shri Khem Singh, resident of Village Bag, (Trahi), Post, Office
Jachh, Tehsil Chachiot, District Mandi, H. P.

.....Accused.

Complaint under Section 138 of Negotiable Instruments Act.

For the complainant	: Shri N. K. Thakur, learned Advocate.
For the accused	: Shri N. K. Sharma, learned Advocate.

JUDGMENT

This complaint for commission of offence under Section 138 of
Negotiable Instruments Act has been filed for punishing the accused as per law.

2. Briefly the case of complainant is that accused was well known to him
who in the month of April 2016, borrowed an amount in the sum of ₹ 2,00,000/- for
his domestic/business needs. In order to discharge the aforesaid liability, he issued a
cheque bearing number 653911 dated 19.11.2016, amounting ₹ 2,00,000/- of his
account number 20236289787 in favour of complainant. The complainant presented
the cheque for encashment on 20.12.2016, but the same was dishonoured for the
reasons “insufficient funds” in the account of accused vide memorandum dated
27.12.2016. Thereafter, the complainant issued a legal notice dated 18.01.2017, which
was duly received by accused, but despite receipt of the notice, he did not make the

payment of the cheque amount. Hence, this complaint.

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

4. The complainant in order to substantiate his claim has stepped into witness box and has reiterated and reasserted the contents of complaint in verbatim. He has stated that he was well known to accused, who borrowed a sum of ₹ 1,50,000/- in the year 2016 and in order to return the aforesaid money, he had issued a cheque Ext. CW1/A, but the same was dishonoured for want of sufficient funds, and that, despite legal notice the accused did not make the payment.

5. The accused, in his statement recorded under Section 313 of Code of Criminal Procedure has claimed false implication and has stated that his cheque was lying with Nirmal Singh and he had not given any cheque to complainant. However, he has not led any evidence in support of his defence.

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 ₹ 2,00,000/- for discharging his legal liability, which on presentation was dishonoured for the reason “funds insufficient” and despite legal notice he 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. 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.

11. In this case, the cheque Ext. CW1/A was issued on 19.11.2016. It was presented by the complainant on 20.12.2016. It was dishonoured on 27.12.2016 vide dishonour memo Ext. CW1/B. Thereafter, the complainant issued a legal notice Ext. CW1/D dated 18.01.2017, through postal receipt copy Ext. CW1/E. The notice was duly received by accused vide acknowledgement Ext. CW1/F. 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.

12. The complainant has discharged his burden of proof. If the cross-examination of complainant is taken into consideration then it can safely be said that accused could not rebut the presumption attached to negotiable instrument. The complainant has stated that he had given money to accused in the month of April 2016. In the complaint also he has pleaded that accused borrowed the amount in the

month of April 2016. He has stated that the cheque was written and signed by accused in presence of Raju. He has denied that accused did not issue the cheque and that blank cheque was in possession of a person namely Nirmal Singh. He has denied that he took the cheque from Nirmal Singh and filled the same. He has denied that accused is not known to him. He has denied that he never issued notice to accused.

13. If the pattern of cross examination of complainant is perused then it shows that the accused has taken the defence that the cheque was in possession of Nirmal Singh which the complainant had misused by filling it. However, the accused has not led any evidence to establish his defence. I am aware of the fact that it is not obligatory for accused to lead evidence to prove his innocence, but I am of the considered view that in this case it was for accused to establish his defence with cogent and reliable evidence as the complainant has not admitted his suggestions.

14. Though, the accused has stated that his cheque was lying in possession of Nirmal Singh and that complainant misused the same by writing and signing the same, but he has not taken any steps for comparison of his signatures.

15. As a matter of fact, accused has admitted that after dishonour of the cheque, he received a legal notice. Admittedly, he had not protested the legal notice issued by learned counsel for complainant. If he had no transaction with complainant then it was for him to protest and respond this fact. Since he 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.).

16. Otherwise also, the accused did not produce any positive and reliable evidence on record in order to rebut the presumption. He even has not

examined Nirmal Singh to establish that his cheque was lying in his possession. The presumption provided under Section 139 of the Negotiable Instruments Act is in favour of the holder of the cheque. It is not mentioned in the Section that this presumption would operate only against the drawer. After all a presumption is only for casting the burden of proof as to who should adduce evidence in a case. It is open to the accused to adduce evidence to rebut the said presumption. When the accused does not choose to adduce any rebuttal evidence then it can safely be said that the accused has failed to rebut the presumption.

17. 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.

18. 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.”

19. 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.”

20. In this case, the complainant has categorically testified that the cheque was dishonoured due to the funds insufficient in the account of accused 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. If the accused has not to discharge any liability of the complainant, then question would arise, how this cheque bearing account number of the accused, came in the hand of the complainant. Moreover, as per law laid down by Hon'ble High Court of Andhra Pradesh in 2010(3) Civil Court Cases 13 (A.P.), D. Atchyutha Reddy Vs. State of A.P., as well as by Hon'ble High Court of Madras in 2005(1) Civil Court Cases 608 (Madras), P.S.A. Thamotharan Vs. Dalmia Cements (B) Ltd., it is absolutely clear that the cheque can be filled by anybody, if it is signed by the account holder and merely filling the cheque by other person, if signed by the account holder, the accused person cannot be relieved from his liability. 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.

21. Thus, in view of the judgments cited and discussion rendered hereinabove, it can safely be said that it was for the accused to disprove the legal presumptions, but he has failed to do so. Accordingly, point number 1 is decided in affirmative and in favour of the complainant.

POINT NO.II (FINAL ORDER):

22. 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 25th day of July 2018.

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

(harsh)

QUANTUM OF SENTENCE

25.08.2018:

Present:- Shri N.K.Thakur, learned Advocate for complainant.

Convict in person with Shri N.K.Sharma, learned Advocate.

Complainant has stated that convict has made the entire payment and that he does not want that accused be sentenced to imprisonment. Statement to this effect recorded and placed on record. Since the complainant is not intending to send the convict in imprisonment, hence, keeping in view the fact that the convict has already made the entire payment, a lenient view is taken in sentencing the convict. Thus, in order to avoid multiplicity of litigation, convict is sentenced till rising of court and to pay fine in the sum of ₹ 100/- (₹ one hundred only) for the commission of offence, punishable under Section 138 of the Negotiable Instruments Act. Fine imposed is deposited. Receipt vide number 0237976, dated 25.08.2018, issued. Accused has undergone the sentence. Matter stands disposed of. Copy of this order be given to convict free of cost. File, after due completion, be consigned to the records.

Announced.

25.08.2018.

(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 Dhandev	Complainant.

Form-B

List of Exhibits

Exhibit	Date of Exhibit	Description of Exhibits.
Ext. CW1/A	07.11.2017	Cheque.
Ext. CW1/B	-do-	Memo.
Ext. CW1/C	-do-	Intimation letter.
Ext. CW1/D	-do-	Copy of legal notice.
Ext. CW1/E	-do-	Postal receipt.
Ext. CW1/F	-do-	Acknowledgement.

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