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

Registration No.	*: 26/2017*
CNR No.	*: 04-000245-2017*
Case No.	*: 62-I/2017/ 56-III/2017*
Presented on	*: 09.03.2017*
Decided on	*: 19.11.2018*

Devi Ram, son of Shri Narpat Ram, resident of Village Khani, Post Office Dhabed, Tehsil Balichowki, District Mandi, H.P.

……Complainant.

Versus

Jagdish son of Shri Bhadar, resident of Village Khani, Post Office Dhabed, Tehsil Balichowki, District Mandi, H.P.

……..Accused.

Complaint under Section 138 of Negotiable Instruments Act.

For the complainant	: Shri T. R. Jamwal, learned Advocate.
For the accused	: Shri Navneet Vasisth, learned Advocate.

JUDGMENT

The relevant facts for adjudication of the complaint are that the complainant was well known to accused, who in the month of November 2016, requested the complainant and borrowed an amount in the sum of ₹ 1,50,000/- for a period of one month, but in the month of December 2016, when the complainant approached him to return the aforesaid amount, the accused issued a cheque bearing number 000001 dated 01.01.2017 amounting ₹ 1,50,000/- of HDFC Bank, Main Road Bhunter, District Kullu, of his account number 50200006679171. The complainant presented the aforesaid cheque for encahment, but it was dishonoured for the reason "exceed arrangement" in the account of accused vide dishonour memo dated 27.01.2017. A legal notice dated 09.02.2017, was issued to accused on his correct address, but he did not make the payment despite receipt of the notice, hence, this complaint.

2. 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.

3. Complainant Devi Ram has appeared into the witness box and has proved cheque Ext. CW1/B, dishonour memo Ext. CW1/C, intimation letter Ext. CW1/D, legal Notice Ext. CW1/E and postal receipt Ext. CW1/F. In cross examination he has stated that he had issued notice to accused for two times. Stated that he himself had filled the cheque. Voluntarily stated that accused had handed over three duly signed blank cheques to him and out of them two are in his possession. Denied that he and accused were running joint business and that he had taken out the cheques of accused from his bag. Stated that they are from same village and are not relatives. Denied that legal notice was not issued to accused. Denied that there was no transaction with accused. Stated that the accused had borrowed money in the year 2014 for purchasing vehicles in presence of Ved Ram which he had withdrawn from bank at Aut. Denied that accused had not borrowed the money. Denied that accused did not issue any cheque.

4. After that, statement of accused under Section 313 of Code of Criminal Procedure was recorded, in which he claimed false implication and has stated that his cheque has been misused by the complainant and that he had taken his three cheques. However, the accused has not led any evidence in support of his defence.

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

6. Following points arise for determination:-

I Whether the complainant has been able to prove that the accused had issued cheque amounting to ₹ 1,50,000/- for discharging his legal liability, which on presentation was dishonoured for the reason “exceed arrangement” and despite legal notice he did not make the payment, as alleged?

II Final Order.

7. 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

8. 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.

9. In the instant case, complainant has proved the cheque Ext. CW1/B, amounting ₹ 150,000/- dated 01.01.2017, containing the signatures of accused. The complainant has also proved dishonour memo Ext. CW1/C, dated 27.1.2017 which demonstrates that the cheque was bounced for the reason “Exceed arrangement ”. The legal notice Ext. CW1/E, dated 9.2.2017 was issued by post on the address of accused. The accused has not disputed his address. The legal notice was issued through postal service and the postal receipt is duly proved as CW1/F. Admittedly, the accused did not make the payment, hence, the offence under Section 138 of the Negotiable Instruments Act is duly constituted. Thus, the complainant has discharged the initial burden qua the fact that the accused had issued a bogus cheque which on presentation was dishonoured and despite issuance of legal notice the accused did not make the payment within stipulated period. .

10. The defence of accused as put to the complainant in cross

examination is that he neither borrowed any amount nor issued any cheque to complainant. According to accused, he and complainant were running joint business and the complainant had taken three cheques from him. However, in the cross examination it is suggested that the complainant had taken out the cheque from the bag of accused and as such the defence taken by accused is not consistent.

11. The accused has taken sufficient time to produce his evidence, but he has failed to produce the same. He did not offer himself for cross examination by the complainant.

12. I am aware of the fact that accused is not required to give evidence in all cases, but, in this case, it was for the accused to rebut the presumption attached to the negotiable instruments, but the accused has failed to rebut the same with cogent and reliable evidence. In, ***V.S.Yadav v. Reena, 172 (2010) DLT 561,*** the Hon'ble Delhi High Court has commented on the obligation of the accused while setting up the defence to repulse the defence created by virtue of Section 118 and Section 139 of Negotiable Instruments Act. Relevant paragraphs of the judgment are reproduced hereunder:-

> *"5. It must be borne in mind that the statement of accused under Section 281 Cr.P.C. or under Section 313 Cr.P.C. is not the evidence of the accused and it cannot be read as part of evidence. The accused has an option to examine himself as a witness. Where the accused does not examine himself as a witness, his statement under Section 281 Cr.P.C. or 313 Cr.P.C. cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused was truthful. In the present case, the accused in his statement stated that he had given cheques as security. If the accused wanted to prove this, he was supposed to appear in the witness box and testify and get himself subjected to cross examination. His explanation that he had the cheques as security for taking loan from the complainant but no loan was given should not have been considered by the Trial Court as his evidence and this was liable to be rejected since the accused did not appear in the witness box to dispel the presumption that the cheques were issued as security. Mere suggestion to the witness that cheques were issued as security or mere explanation given in the statement of accused under Section 281 Cr.P.C., that the cheques were issued as security, does not*

amount to proof. Moreover, the Trial Court seemed to be obsessed with idea of proof beyond reasonable doubt forgetting that offence under Section 138 of N.I. Act was a technical offence and the complainant is only supposed to prove that the cheques issued by the respondent were dishonoured, his statement that cheques were issued against liability or debt is sufficient proof of the debt or liability and the onus shifts to the respondent/ accused to show the circumstances under which the cheques came to be issued and this could be proved by the respondent only by way of evidence and not by leading no evidence."

"7. ... ... Mere pleading not guilty and stating that the cheques were issued as security, would not give amount to rebutting the presumption raised under Section 139 of N.I. Act. If mere statement under Section 313 Cr.P.C. or under Section 281 Cr.P.C. of accused of pleading not guilty was sufficient to rebut the entire evidence produced by the complainant/ prosecution, then every accused has to be acquitted. But, it is not the law. In order to rebut the presumption under Section 139 of N.I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheques were issued. It was for the accused to prove if no loan was taken why he did not write a letter to the complainant for return of the cheque. Unless the accused had proved that he acted like a normal businessman/prudent person entering into a contract he could not have rebutted the presumption under Section 139 N.I. Act. If no loan was given, but cheques were retained, he immediately would have protested and asked the cheques to be returned and if still cheques were not returned, he would have served a notice as complainant. Nothing was proved in this case".

13. Thus, the burden to rebut the aforesaid evidence was on the accused. However, he could not discharge his burden to rebut the presumption attached to the negotiable instrument.

14. Admittedly, a legal notice Ext. CW1/D was issued to accused, but the accused did not reply the same. Accused has taken the plea that he did not receive the notice, but he has not disputed his address. The complainant has proved the postal receipt which amply demonstrates that the accused was served with legal notice which was sent by learned counsel for complainant on 9.2.2017. The notice is deemed to have been served with the addressee or he is deemed to have the knowledge of the notice unless and until contrary is proved at the stage of evidence. In this regard reliance is placed on the judgment of the Hon'ble Apex Court in the case of ***Ajeet Seeds Ltd. V. K. Gopala Krishnaiah*, 2014 12 SCC 685.**

The relevant para Nos. 4, 5 and 6 of the judgment are reproduced as under:-

> *4. The Proviso (b) & (c) appended to Section 138 of the Act lays down the conditions which are to be complied with before a complaint under Section 138 of the Act could be filed, which are quoted hereunder:-- "138. Dishonour of cheque for insufficiency, etc., of funds in the account.-*
>
> > *Provided that nothing contained in this section shall apply unless--*
> >
> > > *(a) ....*
> > >
> > > *(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
> > >
> > > *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
> > >
> > > *Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.*
>
> *5. A perusal of Clauses (b) & (c) to the proviso would indicate that before a complaint could be filed, the payee or the holder in due course of the cheque, as the case may be, is to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and the drawer of such cheque fails to make payment of the said amount to the payee or as the case may be, to the holder in due course within 15 days of the receipt of notice.*
>
> *6. The Apex Court in the case C.C. Alavi Haji v. Palapetty Muhammed and another, 2007 6 SCC 555, held as under:--*
>
> > *"10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.*
> >
> > *11. However, that the referring Bench was of the view that this Court in Vinod Shivappas case did not take note of Section 114 of Evidence Act in its proper perspective. It felts that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it*

was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement out of station; and that there should be a further averment that the addressee-drawer had deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.

12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

Section 114- Court may presume existence of certain facts -The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

(f) That the common course of business has been followed in particular cases.

....

13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

27. Meaning of service by post -

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by *properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh, 1992 AIR(SC) 1604; State of M.P. v. Hiralal and Ors., 1996 7 SCC 523 and V. Raja Kumari v. P. Subharama Naidu and Anr, 2004 8 SCC 774. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasis that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends."

15. Learned counsel for accused has argued that the complainant could not furnish any document or account books qua lending of money and therefore, the complaint is liable to be dismissed. So far as this argument is concerned, no doubt, the complainant has failed to produce the account books and document qua lending of money, but mere fact that the complainant could not produce the documents is not sufficient to rebut the presumption attached to the cheque. In, ***Sh.Harbhajan Singh Ahuja vs. Sukhdev Singh 2013 (3) Civil Court Cases 633 (P&H)***, it was held that account books need not be produced as there is presumption that if the cheque was issued then it will be presumed that it was issued for consideration. In, ***2010 (3) Civil Court Cases 067 (Bombay), Martand Purushottam Parse v. Kishor G.Rotey***, it was held that, it is not necessary for the complainant to issue cheque to the accused and it is not proper to doubt the version of the complainant merely because he chooses to advance hand loan by cash. It was held that it is unreasonable to expect the complainant to examine eye witnesses to the hand-loan when there is documentary evidence in favour of the complainant which was not rebutted.

16. 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.

17. By now it is settled that presumption under Section 139 of the Negotiable Instruments Act includes the presumption of the existence of a legally enforceable debt or liability. Thus, whenever the cheque is issued, 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. Reference to this effect may be made to the judgment of Hon'ble Supreme Court reported in ***2013 Lawsuit (Supreme Court)***

680 C. Keshavamurthy vs. H. K. Abdul Zabbar.

18. In this case, the complainant has categorically testified that the cheque was dishonoured and as such the complainant has discharged the preliminary burden by exhibiting memo Ext. CW1/C 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/B has not been bounced or this memo Ext. CW1/C 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. The accused in the cross examination of complainant has tried to establish that the complainant had stolen the cheque from the bag of accused, but in the statement under section 313 of Code of Criminal Procedure, he has given a different version. The evidence shows that the explanation which has been rendered by the accused in his statement under section 313 of Code of criminal procedure was the voluntary statement of complainant that accused had handed over three blank cheques to him. Thus, the accused by offering this explanation has supported the evidence of 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.

19. The plea of accused that his cheque has been misused by the complainant cannot be considered because he has not taken any action against the complainant till date. If his cheque had been misused by the complainant then after

getting the knowledge of this fact he should have taken appropriate legal action against him. He remained silent and has not initiated any legal action ad therefore from this silence of the accused an inference can be drawn that his defence is not sustainable in the eyes of law. I am aware that in cross examination, the complainant has stated that the money was borrowed in the year 2014, but this evidence cannot be considered as fatal to the case of complainant because the opinion cannot be based merely on the basis of stray sentence appearing in the cross examination of the witness. The evidence is required to be seen as whole and if the entire evidence is taken into consideration then it can safely be held that the complainant has proved his case to establish the offence under section 138 of Negotiable Instruments Act.

20. Accordingly, point number 1 is decided in affirmative and in favour of the complainant.

POINT NO.II (FINAL ORDER):

21. 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 19th day of November 2018.

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

QUANTUM OF SENTENCE

03.12.2018:
Present:- Complainant in person with Shri N. S. Thakur, learned vice counsel.

Convict in person with Shri Navneet Vashisth, learned Advocate.

I have heard learned vice 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 first offender and is sole bread earner of his family.

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 "exceed arrangement" 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 six months for the commission of offence punishable under Section 138 of Negotiable Instrument Act and shall also pay compensation in the sum of ₹ 1,90,000/- (₹ one lakh ninety thousand) 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.
03.12.2018.

(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 Devi Ram	Complainant.

Form-B

List of Exhibits

Exhibit	**Date of Exhibit**	**Description of Exhibits.**
Ext. CW1/A	12.06.2018	Affidavit of Shri Devi Ram.
Ext. CW1/B	-do-	Cheque.
Ext. CW1/C	-do-	Memorandum.
Ext. CW1/D	-do-	Intimation memo.
Ext. CW1/E	-do-	Copy of legal notice.
Ext. CW1/F	-do-	Postal receipt.

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