

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. Crl. Misc. No. M-37492 of 2012
Nitin ChadhaPetitioner

Versus

M/s Swastik Vegetable Products Pvt. Ltd. & Anr.Respondents

2. Crl. Misc. No. M-38472 of 2012
Nitin ChadhaPetitioner

Versus

M/s Swastik Vegetable Products Pvt. Ltd. & Anr.Respondents

3. Crl. Misc. No. M-37522 of 2012
Nitin ChadhaPetitioner

Versus

M/s Swastik Vegetable Products Pvt. Ltd. & Anr.Respondents

DATE OF DECISION: 10.2.2015

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

- 1. Whether reporters of local newspaper may be allowed to see judgment?**
- 2. To be referred to reporters or not?**
- 3. Whether the judgment should be reported in the Digest?**

Present:- Mr. Namit Gautam, Advocate
for the petitioner.

Mr. H.S. Ghuman, Advocate
for respondent No.1.

Mr. Sunil Narang, Advocate
for respondent No.2.

DAYA CHAUDHARY, J.

By this judgment, three petitions bearing Crl. Misc. Nos. M-

37492, 38472 and 37522 of 2012 shall stand disposed of as common question of law and facts are involved in all the three cases. However, for the sake of convenience, the facts are being extracted from Crl. Misc. No. M-37492 of 2012.

The present petition has been filed under Section 482 Cr.P.C. for quashing of complaint No. 14727 of 2012 dated 20.7.2012 as well as summoning order dated 8.8.2012 passed by JMIC, Ludhiana and all subsequent proceedings arising therefrom.

Briefly, the facts of the case as made out in the petition are that the petitioner took a loan of ₹ 15 lacs from respondent No.1-company in three instalments and he, thereafter, issued three post dated cheques dated 29.5.2012 of ₹ 5 lac each, towards repayment of the loan by mentioning 'yourself'. As per case of the petitioner, a Real Time Gross Settlement Fund Application Form (RTGS) was filled by him along with each cheque. On presentation of cheques along with RTGS forms for transfer of ₹ 15 lacs from the petitioner's account to the account of respondent No.1, the same were returned with the remarks 'funds insufficient'. A legal notice was served upon the petitioner on 14.6.2012 by respondent No.1 calling upon him to make payment of ₹ 15 lacs within 15 days from the date of receipt of the notice but the petitioner failed to do so. After expiry of aforesaid period of 15 days, respondent No.1 filed three complaints under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act') before JMIC, Ludhiana on 20.7.2012 and the petitioner was summoned to face trial vide order dated 8.8.2012.

The said complaints as well as summoning orders are subject matter of challenge in the present three petitions filed by petitioner-Nitin Chadha.

Learned counsel for the petitioner contends that cheques were

drawn by mentioning 'Yourself' which means 'drawn in favour of the Bank' and no offence is made out under Section 138 of the Act. Learned counsel further contends that the cheque drawn as 'Yourself' was not in favour of anybody and it was not to be encashed by the complainant-respondent No.1. As per clause (b) to the proviso of Section 138 of the Act, the demand for payment or dishonour of the cheque was to be made either by the payee or by the 'holder in due course' of the cheque but it does not include 'holder' as has been defined under Section 8 of the Act. Learned counsel also contends that the complainant was neither the 'payee' nor the 'holder' in due course of the cheques in dispute and the same were not issued in favour of the complainant. It is also the argument of learned counsel that the complainant has not given any details of advancement of loan and it cannot be said the cheques in dispute were issued in discharge of any liability. Learned counsel has also relied upon Division Bench judgment of this Court in **Punjab National Bank Vs. Himgiri Traders and another** 2003 (4) RCR (Criminal) 876, Single Bench judgment of this Court in **V.K. Gupta Vs. Manjit Kaur** 2008 (3) RCR (Criminal) 430, of Madras High Court in **Poppys Spinning Mills (P) Ltd. Vs. C. Visalakshi and another** 2006 (1) DCR 16 and of Gauhati High Court in **Dr. Jiten Barkakoti Vs. Subrata Patangia and another** 2006 (1) DCR 278, in support of his contentions.

Learned counsel for respondent No.1 submits that the petitioner has not denied the fact regarding issuance of three cheques of ₹ 15 lacs along with RTGS forms duly filled in by him. The petitioner has deliberately concealed the fact that he has issued RTGS forms for transfer of money to the account of respondent No.1. The cheques were drawn in favour of 'Yourself' means that the cheques were drawn in favour of the Bank with the instruction given in RTGS forms for transfer of money directly

to the account of respondent No.1. Learned counsel further contends that when the cheques in favour of 'Yourself' were accompanied by some instructions to the Bank then the Bank was to comply with those instructions and hence the provisions of Section 138 of the Act are attracted. Learned counsel also contends that a well reasoned summoning order has been passed after recording preliminary evidence of the complainant and all the facts and allegations are matter of evidence, which could be examined during the trial only. Thus, no interference is required for at this stage and the present petition for quashing of the complaint and summoning order is not maintainable. Learned counsel has also relied upon the judgments of Delhi High Court in **Rajesh Agarwal Vs. State and another** 2010 (94) AIC 431 and of Andhra Pradesh High Court in **Nageshwara Rao Vs. B.V. Subbaiah and another** 2000 (1) Comp Cas 526, in support of his contentions.

Heard the arguments advanced by learned counsel for the parties and have also gone through the complaint as well as summoning order, which are subject matter of challenge in the present petitions.

For resolving the controversy in dispute, Section 138 of the Act is relevant, which is reproduced as under:-

138. Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made

with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(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.]

Section 9 of the Act defines ‘holder in due course’, which is reproduced as under:-

“Holder in due course”.- “Holder in due course” means any person who for consideration became the possessor of a promissory note, bill of exchange of cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order],

before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.”

Section 7 of the Act defines words ‘drawer and drawee’, which is reproduced as under:-

“Drawer”, “drawee”. —The maker of a bill of exchange or cheque is called the “drawer”; the person thereby directed to pay is called the “drawee”.

“drawee in case of need”. —When in the bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need such person is called a “drawee in case of need”.

“acceptor”. —After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the “acceptor”.

“acceptor for honour”. — 2 [When a bill of exchange has been noted or protested for non-acceptance or for better security], and any person accepts it supra protest for honour of the drawer or of any one of the indorsers, such person is called an “acceptor for honour”.

“Payee”. —The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the “payee”.

The maker of a bill of exchange or cheque is called the drawer and the person thereby directed to pay is called drawee.

In the present case, the drawee is bank as the cheques were drawn by mentioning 'Yourself'. As per clause (b) to proviso of Section 138 of the Act, the demand for the payment or dishonour of cheque was to be made either by payee or the 'holder in due course' of the cheque. As per submissions made by learned counsel for the petitioner, complainant-respondent No.1 was neither the payee nor the 'holder in due course' of the cheques in dispute as the cheques were not issued in favour of the complainant. It is also the argument of learned counsel for the petitioner that the provisions of Sections 118 and 139 of the Act are not applicable as the complainant is neither 'payee' nor the 'holder in due course' and dishonour of cheques in such situation does not amount to penal offence under Section 138 of the Act. The stand of respondent No.1 is that since the cheques in dispute were accompanied by RTGS forms with a clearcut instruction to transfer the amount of cheques in dispute in the account of respondent No.1, therefore, the provisions of Section 138 of the Act are attracted. Learned counsel for respondent No.1 has also brought to the notice of this Court the photocopies of the cheques, which shows that there was a clear cut instruction on the back side of the cheque that the amount was to be transferred to the account of respondent No.1. The name of the transferee was clearly mentioned on cheque. As per procedure adopted by the Bank, different type of cheques are issued by adopting different methods, which is reproduced as under:-

Open cheque or bearer cheque: The issuer of the cheque would just fill the name of the person to whom the cheque is issued, writes the amount and attaches his signature and nothing else. This type of issuing a cheque is also called bearer type cheque also known as open cheque or uncrossed cheque. The cheque is negotiable from the date of issue to

three months. The issued cheque turns stale after the completion of three months. It has to be revalidated before presenting to the bank.

A crossed cheque or an account payee cheque: It is written in the same as that of bearer cheque but issuer specifically specifies it as account payee on the left hand top corner or simply crosses it twice with two paralalled lines on the right hand top corner. The bearer of the cheque presenting it to the bank should have an account in the branch to which the written sum is deposited. It is safest type of cheques.

A self Cheque: A self cheque is written by the account holder as pay self to receive the money in the physical form from the brach where he holds his account.

Pay yourself cheque: The account holder issues this type of crossed cheque to the bank asking the bank to deduct money from his account into bank's own account for the purpose of buying banking products like drafts, pay orders, fixed deposit receipts or for depositing money into other accounts held by him like recurring deposits and loan accounts.

Post dated cheque: (PDC): A PDC is a form of a crossed or account payee bearer cheque but post dated to meet the said financial obligation at a future date.

Various types of ceques based on their functionality:

Local cheque: A local cheque is a type of cheque which is valid in the given city and a given branch in which the issuer has an account and to which it is connected. The producer of the cheque in whose name it is issued can directly go to the designted bank and receive the money in the physical form. If

a given city's local cheque is presented elsewhere it shall attract some fixed banking charges. Although these type of cheques are still prevalent, especially with nationalised banks. It is slowly stated to be removed with at par cheque type.

At par cheque: With the computerisation and networking of bank branches with its headquarters, a variation to the local cheque has become common place in the name of at par cheque. At par cheque is a cheque which is accepted at par at all its branches across the country. Unlike local cheque it can be presented across the country without attracting additional banking charges.

Banker's cheque. It is a kind of cheque issued by the bank itself connected to its own funds. It is a kind of assurance given by the issuer to the client to allay your fears. The personal account connected cheques may bounce for want of funds in his account. To avoid such hurdles, sometimes, the receiver seeks banker's cheque.

Travelers' cheque: They are a kind of an open type bearer cheque issued by the bank which can be used by the user for withdrawal of money while touring. It is equivalent to carrying cash but in a safe form without fear of losing it.

Gift cheque: This is another banking instrument introduced for gifting money to the loved ones instead of hard cash.

In the present case, undisputedly the Bank is holder of the cheques but as per endorsement as well as the fact that cheques were accompanied by RTGS forms for transfer of the amount in the account of respondent No.1, it is respondent No.1 only who was to collect the amount.

Respondent No.1 is the payee in an indirect manner as the amount was to

be transferred in its account through cheques as per clearcut instructions given in RTGS form and, therefore, it cannot be said that complainant was having no authority to file the complaint. A mere holder or endorsee without consideration cannot come within the purview of word 'another person'. Accordingly, respondent No.1-complainant can safely be said to be payee or holder or holder in due course. The bank in the present case is merely a holder but without consideration the endorsement was meant for respondent No.1 to collect the amount. Accordingly, respondent No. 1 became payee of the cheques and on bouncing of same, the complaint was filed by him. This view has also been taken by Andhra Pradesh High Court in **Nageshwara Rao's case(supra)**, wherein, it was held as under:-

“At the first sight, the submission is quite feasible. But there is a twist in this case. The complainant is not a mere holder. It is true that he is the endorsee without consideration. But the endorsement here is “to collect”. That endorsement clothes the complainant with the authority to issue notice and realise the amount by filing a civil suit and also a criminal complaint. Therefore, the ratio of the Bench judgment cannot squarely be applied to the facts of this case. In pursuance of the authority given to the complainant “to collect”, he issued the notice and the cheques were given in the name of complainant. Therefore, he became the payee under the cheques. When the cheques bounced, certainly he can file the complaint to enforce his duty “to collect” the amount under the instrument. Such a step is taken by the complainant in this case. Therefore, it cannot be said that the complainant has no authority to file the complaint. I hold accordingly.”

Moreover, the offence under Section 138 of the Act is technical

in nature and defence to be taken by the accused is inbuilt as the cheques were given without consideration but the onus of proving the defence is upon the accused alone as provided under Section 106 of the Evidence Act. In a case under Section 138 of the Act, the trial is conducted in a summary manner and the evidence is given by the complainant by way of an affidavit, which is sufficient to prove the offence. The evidence is not required to be given again in terms of Section 145 (1) of the Act and same has to be read during trial. The witnesses or the complainant can be recalled only when accused makes an application and only in circumstances when some reasonable ground is there to recall the witnesses. The offence under Section 138 of the Act is not like the offence under IPC. The offence under Section 138 of the Act is an offence of personal nature of the complainant and it is an offence, which is made under Negotiable Instrument Act so that the trust in commercial transactions is not destroyed because of dishonour of cheque. When it is within the knowledge of the accused as to why he is not to face the trial under Section 138 of the Act, he is to take the plea of defence and burden cannot be shifted upon the complainant. No presumption, therefore, can be drawn that even if the accused has failed to bring out his defence, he is still to be considered as an innocent. In case the accused has a defence against dishonour of cheque in dispute, it is he alone who knows the defence and is responsible to spell it out to the Court and to prove it. Once the complainant has brought forward his case by giving his affidavit about issuance of cheques, dishonour of cheques, issuance of demand notice etc., he can be cross-examined only if the accused makes an application to the Court as to on what point he wants to cross-examine the witness.

In view of facts as well as law position explained above, the

judgments cited by learned counsel for the petitioner are not applicable keeping in view the facts of the present case and as such complaint as well as summoning order cannot be quashed.

Accordingly, there is no merit in the petition and all the petitions being devoid of any merit are hereby dismissed.

10.2.2015
pooja

(DAYA CHAUDHARY)
JUDGE