

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-AS-98-2023

Date of Decision: February 28, 2023

Uma Rani

... Appellant

Versus

Rajesh Jain

...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Ashok Baliyan, Advocate for the appellant.

Mr. Dharam Yudhister Singh, Advocate for
Mr. Vishal Bhargava, Advocate for the respondent.

DEEPAK GUPTA, J.

In criminal complaint bearing case code No. '205600000112014' titled as "*Uma Rani v. Rajesh Jain*" filed by the appellant Uma Rani to prosecute respondent Rajesh Jain under Section 138 of the Negotiable Instruments Act, 1881 (hereafter referred as 'the N.I. Act'), acquittal has been recorded by learned Sub Divisional Judicial Magistrate, Kalka, vide judgment dated 09.06.2016, against which this appeal has been preferred.

2. As per the case pleaded by the appellant – complainant, friendly loan of ₹1,59,500/- was advanced by her to respondent-accused on 01.08.2010. Though, accused had promised to return the said amount within one month, but he kept on avoiding the matter on one or the other pretext. Ultimately, in order to discharge his liability, accused issued cheque No.008361 dated 03.12.2012 for an amount of ₹1,59,500/- drawn on Hongkong and Shanghai Banking Corporation Limited in favour of the complainant, assuring that cheque will be encashed on presentation. However, on presentation, the cheque was dishonoured, vide return memo dated 12.12.2012 with the remarks "accounts closed".

Complainant informed the respondent-accused about the dishonour of

the cheque and he promised to make the amount in cash within 2-3 days, but he failed to make the payment. Complainant then served a legal notice dated 18.12.2012 and sent the same to the accused through registered post asking him to make payment of the cheque amount within 15 days of the receipt of the notice. The accused failed to do so, which compelled the complainant to file the complaint on 11.01.2013.

3. After recording preliminary evidence, respondent-accused was summoned to face prosecution under Section 138 of the N.I. Act. On his appearance, he was served with notice of accusation under Section 138 of the N.I. Act on 06.01.2014, to which he pleaded not guilty and claimed trial. Complainant appeared in the witness box as her own witness as CW1. Statement of the accused under Section 313 Cr.P.C. was recorded. He did not adduce any defence evidence. After hearing both the sides, learned Trial Magistrate recorded acquittal as mentioned earlier.

4. It is contended by learned counsel for the appellant-complainant that learned Trial Court misread the entire evidence of the appellant-complainant. Appellant-complainant stated during cross-examination that she had withdrawn an amount of ₹1,00,000/- from her bank account two days before advancing the loan to the respondent-accused. The bank statement produced before this Court in additional evidence supports her statement in this regard. The appellant-complainant had also stated that her both sons and daughter-in-law were also working and that she was living in a joint family, proving that she had the financial capacity. The Trial Court failed to consider that in his statement under Section 313 Cr.P.C., respondent-accused alleged that his signed cheque was stolen but he neither lodged any DDR nor any

complaint. So much so, respondent-accused even did not reply to the legal notice regarding stealing of the cheque or misuse of the same. The appellant-complainant submits that in fact respondent-accused himself had issued the duly filled in and signed cheque to discharge his liability. However, learned Trial Court ignored the statement under Section 313 Cr.P.C. Besides, respondent-accused did not enter the witness box nor led any evidence to support his stand and as such, the statement of the respondent-accused to the effect that his cheque was stolen, is not at all believable.

5. Refuting the aforesaid contentions, learned counsel for the respondent-accused defended the Trial Court judgment and submitted that acquittal has been rightly recorded.

6. I have considered submissions of both the sides and have also perused the record carefully.

7. Ex. C-1 is the cheque dated 03.12.2012 for ₹1,59,500/-. EX. C-2 is the bank return memo dated 12.12.2012 issued by the bank, as per which cheque was dishonoured due to accounts being closed. Ex. C-3 is the copy of legal notice dated 18.12.2012 and the same was sent to the respondent-accused through registered post as is evident from the postal receipt Ex. C-4. Respondent-accused nowhere denied his signatures on the cheque. As evident from the questions put to the appellant-complainant in her cross-examination and the statement of accused under Section 313 Cr.P.C., the stand taken by the accused is that his signed cheque was stolen by the appellant-complainant and misused. Thus, his signature on the cheque is not denied by the accused. Once it is so, there is presumption under Section 139 of the N.I. Act in favour of the

appellant-complainant.

8. Once signatures on the cheque are admitted to be that of accused, presumption under Section 139 read with Section 118 clause (a) & (b) of the Negotiable of Instruments Act is attracted, which reads as under:-

“139. Presumption in favour of holder. - 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.”

118. 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, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date. - that every negotiable instrument bearing a date was made or drawn on such date;”

9. In *Rangappa vs. Sri Mohan, 2010 (3) Criminal Court Cases 022 (S.C.): 2010 (3) Civil Court Cases 115 (S.C.): 2010 (2) Apex Court Judgments 285 (S.C.): 2010 (11) SCC 441*, a three judge bench of the Hon’ble Supreme Court held that Section 139 of the NI Act includes the presumption regarding the existence of a legally enforceable debt or liability and that the holder of a cheque is also presumed to have received the same in discharge of such debt or liability. It was clarified in the aforesaid decision that the presumption of the existence of a legally enforceable debt or liability is, of course, rebuttable and it is open to the

accused to raise a defence, wherein the existence of a legally enforceable debt or liability can be contested. Without doubt, the initial presumption is in favour of the complainant.

10. Hon'ble Supreme Court further held in above case that Section 139 of the NI Act is stated to be an example of a reverse onus clause, which is in tune with the legislative intent of improving the credibility of negotiable instruments. Section 138 of the NI Act provides for speedy remedy in a criminal forum, in relation to dishonour of cheques. Nonetheless, the Hon'ble Supreme Court cautions that the offence under Section 138 of the NI Act is at best a regulatory offence and legally falls in the arena of a civil wrong and therefore, the test of proportionality ought to guide the interpretation of the reverse onus clause. An accused may not be expected to discharge an unduly high standard of proof, reverse onus clause requires the accused to raise probable defence for creating doubt about the existence of a legally enforceable debt or liability for thwarting the prosecution. The standard of proof for doing so would necessarily be on the basis of "preponderance of probabilities" and not "beyond shadow of any doubt."

11. In **Lekh Raj Sharma Vs. Yash Pal Gupta, 2015 (4) Civil Court Cases 234 (Delhi)**, it has been held by Delhi High Court that accused is obliged to set up a probable defence and that defence cannot be only a 'possible' defence. There should be some credible material or circumstance available on record, which should lead the Court to conclude that defence/explanation for issuance of dishonored cheque is probable one.

12. In **Basalingappa Vs. Mudibasappa 2020 SCC OnLine SC**

491, referring to various precedents on Section 118(a) and 139 of the Negotiable Instruments Act, Hon'ble Supreme Court summarized the principles as under:

- Once the execution of cheque is admitted, Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.*
- The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.*
- To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence.*
- Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.*
- It is not necessary for the accused to come in the witness box to support his defence.*

13. It is in the light of the aforesaid legal position that it is required to be seen that whether accused has been able to probabilise his defence. As is clear from the legal position as above, the accused is not required to prove his defence on the standard of proof 'beyond reasonable doubt' and rather, he is simply required to probabilise his defence. In order to rebut the presumption available to complainant under Section 139 of the NI Act, accused can either appear in the witness box though it is not mandatory; or he can elicit circumstances favourable to him during the cross-examination of complainant; or put forth his defence in his statement under Section 313 Cr.P.C. supported by

evidence. He is not even required to lead evidence to support his defence. At the same time, accused is obliged to set up a probable defence, which should not be only a 'possible' defence. There should be some credible material or circumstances available on record, which should lead the Court to conclude that defence/explanation for issuance of dishonored cheque is probable one.

14. In this case, during her testimony as CW1, it is disclosed by complainant that she had earlier worked at the shop of M/s Mangaldeep owned by Shri Nemnath Jain and that respondent-accused is the brother of said Nemnath Jain. She had become acquainted with the respondent-accused at that show room. She further stated that out of ₹1,59,500/- lent by her to the respondent-accused, she had withdrawn an amount of ₹1,00,000/- two days prior from her bank account. She had left the shop prior to advancing the loan to the respondent-accused. She specifically denied the suggestion that during her job at the show room, she had stolen cheque from the show room and misused the same. She admitted that no receipt was issued by the accused, when she gave the amount of ₹1,59,500/- to the accused nor he executed any other document. She further stated that cheque in question was handed over to her by accused on 03.12.2012 and that during the period from 2010 to 03.12.2012, she did not make any complaint against the accused and not filed any recovery suit, though she used to meet him. According to her statement, she had telephonic talk with the accused regularly.

15. The statement of the complainant - CW1 to the effect that she had withdrawn the amount of ₹1,00,000/- from her bank account two days prior to lending the same to the accused, is supported by her

statement of bank account (Annexure A-1), which reveals that she had withdrawn an amount of ₹1,00,480/- from her bank account on 29.07.2010. The loan was advanced to the accused on 01.08.2010 and thus, statement of appellant-complainant is supported by the fact that she had withdrawn ₹1,00,000/- from her bank account two days prior to advancing of the loan to the respondent-accused.

16. As per the stand taken by the accused in his statement under Section 313 Cr.P.C., he did not borrow any amount from the complainant nor issued any cheque. Complainant was working as a sales girl on the show room and during that period, she stole the bank signed cheque and misused the same auto filling the same. The respondent-accused further stated that after separating from the business from show room, he had got the cheque dishonoured and that he has no liability. He further stated that appellant-complainant did not have the financial capacity to pay any amount to him.

17. Here itself, it may be noted that statement of accused under Section 313 Cr.P.C is not a substantive piece of evidence. If accused put forth his defence in said statement, he must support it with evidence. Reliance can be placed on **Sumeti Vij Vs. M/s Paramount Tech Fab Industries, 2021(2) CCC 348 (SC)**, wherein it has been held by the Hon'ble Supreme Court that statement of accused recorded under Section 313 Cr.P.C is not a substantive evidence of defence, but is only an opportunity to accused to explain the incriminating circumstances appearing in the prosecution case. In that case before the Hon'ble Supreme Court, accused had not led any evidence to rebut the presumption under Section 139 of NI Act. Hon'ble Supreme Court held

that there was no evidence to rebut the presumption that cheques were issued for consideration. Hon'ble Supreme Court held further that once the facts came on record remain unrebutted and supported with evidence on record with no substantive evidence of defence of accused to explain the incriminating circumstances appearing in the complaint against him, no error was committed by the High Court to convict the accused under Section 138 of NI Act.

18. Similar view was taken by the Hon'ble Supreme Court in **Uttam Ram Vs. Devinder Singh Hudan & Anr., 2019(4) CCC 596 (SC)** to the effect that statement of accused under Section 313 Cr.P.C is not a substantive evidence.

19. In present case, respondent-accused did not produce any evidence to rebut the prosecution available to the complainant under Section 139 of the N.I. Act. Statement of the respondent-accused under Section 313 Cr.P.C. is not a substantive evidence and cannot be believed as a gospel truth in the absence of any cogent evidence. The stand of the respondent-accused to the effect that his signed cheque was stolen by the appellant-complainant, who misused the same, is not supported from any evidence. In case, the cheque was stolen or misused, there is no explanation forthcoming from the respondent-accused as to why he did not make any complaint to the police or move any other other authority to take legal action against the appellant-complainant.

20. The contention of Ld. Counsel for the respondent -accused that complainant did not produce any receipt or writing to prove the advancing of the loan amount to the accused and so, she has been rightly disbelieved by the trial court, has no merit. It appears that entire evidence

on record has been misread by learned Trial Court. In a case under Section 138 of the N.I. Act, complainant is not required to discharge the burden placed upon her like in a civil suit. She is not required to prove the liability by proving accounts books and its receipt etc. Necessary ingredients are that cheque was issued by the accused, which was dishonoured and the complaint was filed after making necessary statutory compliances.

21. Reliance can be placed upon **Uttam Ram Vs. Devinder Singh Hudan (supra)**, wherein it has been held by Hon'ble Supreme Court that in case of dishonour of cheque, debt is not to be proved as in a civil suit. In the case before Hon'ble Supreme Court, defence was taken by the accused that cheque book was lost and that cheque was not issued in discharge of any debt or liability. Accused had not appeared as a witness. The complaint was dismissed. Hon'ble Supreme Court set aside the order of dismissal of complaint and acquittal of accused by holding the same to be illegal and unsustainable. Hon'ble Supreme Court held as under:-

'20. The Trial Court and the High Court proceeded as if, the appellant is to prove a debt before civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that the cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability.

21. There is the mandate of presumption of consideration in terms of the provisions of the Act. The onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was

issued not for discharge of any debt or liability in terms of Section 138 of the Act."

22. Further, in **Rohitbhai Jivanlal Patel v. State of Gujarat & another (2019) 18 SCC 106**, it has been held by the Hon'ble Supreme Court that:

"In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing the loan to the accused and want of examination of the relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence."

23. It is clear from the legal position as above that complainant is not obliged to prove the loan or the financial capacity. Once the presumption under Section 139 of the NI Act is available to the complainant, entire burden shifts upon the accused to rebut that presumption, which in the present case accused has utterly failed.

24. Still further, prior to filing of the complaint, statutory notice dated 18.12.2012 under Section 138 of the N.I. Act was sent to the respondent-accused through registered post. There is presumption of service under Section 27 of the General Clause Act to be read with Section 114 of the Evidence Act. Despite the deemed service of the

notice, respondent-accused did not respond to the same. In case, the cheque of the respondent-accused had been stolen or misused, he would have immediately responded to the legal notice denying his liability. So much so, in the natural course of conduct, respondent-accused would have approached the police or the other authorities to take action against the appellant-complainant for misusing the cheque, but no such step was taken. Specific stand of the appellant-complainant is that respondent-accused had given him the filled in cheque. Respondent-accused has not entered the witness box to deny the said fact and to controvert the statement made by the appellant-complainant.

25. In **Rangappa Vs. Sri Mohan, 2010 (3) Crimes 40 (S.C.)**, it has been held by Hon'ble Supreme Court that the very fact that accused had failed to reply to the statutory notice under Section 138 of the Negotiable Instruments Act led to the inference that there was merit in the complainant's version.

26. Same view has been taken in ***C.C. Alavi Haji V. Palapetty Muhammed and another, 2007 (3) RCR (Criminal) 185***, wherein it has been held by Hon'ble Supreme Court in as under:

“It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing the complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper

service of notice as required under Section 138. By ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran's case (supra), if the "giving of notice" was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

27. In **S.P. Mani And Mohan Dairy vs Dr. Snehalatha Elangovan** 2022 (4) Law Herald (SC) 3219, Hon'ble Supreme Court has held as under:-

"44. We may also examine this appeal from a different angle. It is not in dispute, as noted above, that no reply was given by the respondent to the statutory notice served upon her by the appellant. In the proceedings of the present type, it is essential for the person to whom statutory notice is issued under [Section 138](#) of the NI Act to give an appropriate reply. The person concerned is expected to clarify his or her stance. If the person concerned has some unimpeachable and incontrovertible material to establish that he or she has no role to play in the affairs of the company/firm, then such material should be highlighted in the reply to the notice as a foundation. If any such foundation is laid, the picture would be more clear before the eyes of the complainant. The complainant would come to know as to why the person to whom he has issued notice says that he is not responsible for the dishonour of the cheque. Had the respondent herein given appropriate reply highlighting whatever she has sought to highlight before us then probably the complainant would have undertaken further enquiry and would have tried to find out what was the legal status of the firm on the date of the commission of the offence and what was the status of the respondent in the firm. The object of notice before the filing of the complaint is not just to give a chance to the drawer of the cheque to rectify his omission to make his stance clear so far as his liability under [Section 138](#) of the NI Act is concerned.

45. Once the necessary averments are made in the statutory notice issued by the complainant in regard to the vicarious liability of the

partners and upon receipt of such notice, if the partner keeps quiet and does not say anything in reply to the same, then the complainant has all the reasons to believe that what he has stated in the notice has been accepted by the noticee. In such circumstances what more is expected of the complainant to say in the complaint.”

28. Thus, respondent – accused having not responded to the legal notice sent to him prior to filing the complaint, inference is to be drawn that there is merit in the complainant's version and the same is true.

29. On the basis of the entire discussion as above, it is held that the impugned judgment of acquittal cannot be sustained. The impugned judgment of acquittal is set aside and the present appeal is allowed. It is held that the appellant-complainant has successfully proved her case to the effect that the cheque dated 03.12.2012 for an amount of ₹1,59,500/- issued by the respondent-accused was dishonoured due to insufficient funds in his account, as is evident from the statement of CW2 the concerned Bank Manager as the respondent-accused had already closed the bank account. It is further proved that despite legal notice sent to the respondent-accused through registered post, he failed to make payment of the cheque amount within 15 days and so, the accusation under Section 138 of N.I. Act is duly proved. As such, holding the respondent-accused to be guilty under Section 138 of the N.I. Act, he is convicted there-under. Let he be heard on quantum of sentence.

Adjourned to 09.03.2023.

February 28, 2023
sarita

(DEEPAK GUPTA)
JUDGE

Whether reasoned/speaking: Yes/No
Whether reportable: Yes/No