

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRR-3456-2019 (O&M)

Harpal Singh

.... Petitioner

Vs.

State of Haryana and another

.... Respondents

**Reserved on: 21.09.2023
Pronounced on: 12.10.2023**

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present: - Mr. Sanjiv Singh Rao, Advocate, with
Mr. Manish Soni, Advocate, for the petitioner.

Mr. Vipul Sherwal, AAG, Haryana.

Mr. Surender Kumar Daaria, Advocate,
for respondent No.2.

DEEPAK GUPTA, J.

This order shall disposed of 12 revisions i.e. CRR Nos.3456, 3515, 3520, 3481, 3474, 3476, 3471, 3484 & 3479 of 2019 and CRR Nos.1421 and 1986 of 2022, arising out of 12 separate judgments of conviction and orders of sentence, whereby complaints filed by Dharam Singh (respondent herein) or his son Ashok Kumar, for dishonour of different cheques issued by same accused Harpal Singh (petitioner herein) as director of M/s Pal Infrastructure Pvt. Ltd., were decided by ld. Judicial Magistrate, 1st Class, Gurgaon, convicting accused Harpal Singh under Section 138 of the NI Act and sentencing him to undergo imprisonment in each case for varying period and also to pay compensation amount with default sentence. Appeals against those judgments have been dismissed against conviction but with modification of the sentence.

2. To avoid confusion, parties shall be referred as per their status before Ld. Trial court.

3. Necessary details in the tabulated form are given below: -

Compl aint No.	Cheque No.	Date of cheque	Amount of Cheque (in ₹)	Date of Bank Return Memo/ Remarks	Date of conviction by Trial Court	Compensati on Amount & Default period of sentence	Appeal No.	Date of decision of the appeal
1100/ 2015	613233	15.03.2015	2,50,000	19.06.2015/ 'Payment stopped by Court Order'	20.08.2016/ 23.08.2016 - JMIC	₹3,75,000/- SI 6 Months	60/ 31.08.2016	02.11.2019
1101/ 2015	613198	18.04.2015	1,00,000	19.06.2015/ 'Payment stopped by Court Order'	20.08.2016/ 23.08.2016 - JMIC	₹3,75,000/- SI 6 Months	64/ 31.08.2016	02.11.2019
1106/ 2015	613201	18.04.2015	1,00,000	19.06.2015/ 'Payment stopped by Court Order'	20.08.2016/ 23.08.2016 - JMIC	₹1,50,000/- SI 6 Months	55/ 31.08.2016	02.11.2019
1107/ 2015	216565	15.09.2015	11,00,000	21.09.2015/ 'Payment stopped by drawer'	20.08.2016/ 23.08.2016 - JMIC	₹16,50,000/- SI 6 Months	62/ 31.08.2016	02.11.2019
1104/ 2015	216598	15.06.2015	23,50,000	25.06.2015/ 'Funds Insufficient'	20.08.2016/ 23.08.2016 - JMIC	₹35,25,000/- SI 6 Months	56/ 31.08.2016	02.11.2019
1109/ 2015	613234	15.06.2015	2,50,000	21.09.2015/ 'Payment stopped by drawer'	20.08.2016/ 23.08.2016 - JMIC	₹3,75,000/- SI 6 Months	59/ 31.08.2016	02.11.2019
1102/ 2015	613188	15.06.2015	1,50,000	19.06.2015/ 'Payment stopped by Court Order'	20.08.2016/ 23.08.2016 - JMIC	₹2,25,000/- SI 6 Months	63/ 31.08.2016	02.11.2019
1108/ 2015	613231	15.09.2015	25,00,000	21.09.2015/ 'Payment stopped by drawer'	20.08.2016/ 23.08.2016 - JMIC	₹37,50,000/- SI 6 Months	61/ 31.08.2016	02.11.2019
1103/ 2015	613189	15.03.2015	15,00,000	19.06.2015/ 'Payment stopped by Court Order'	20.08.2016/ 23.08.2016 - JMIC	₹22,50,000/- SI 6 Months	579/ 31.08.2016	02.11.2019
2724/ 2015	613218	15.06.2015	3,00,000	24.06.2015/ 'Funds Insufficient'	26.08.2016/ 29.08.2016 - JMIC	RI 1 year & ₹4,00,000/- (Delay not condoned in appeal)	123/ 13.03.2019	07.06.2022
549/ 2015	613217	15.12.2014	3,00,000	14.02.2015/ 'Funds Insufficient'	26.08.2016/ 29.08.2016 - JMIC	RI 1 year & ₹4,00,000/- (Delay not condoned in appeal)	123/ 13.03.2019	07.06.2022
1105/ 2015	613205	15.06.2015	80,00,000	21.09.2015 'Funds Insufficient'	26.08.2016/ 29.08.2016 - JMIC	₹1,20,00,000 /- SI 6 Months	122/ 13.03.2019	07.06.2022

4. (i) The facts, in brief, are being extracted from CRR-3456-2019, which is the offshoot of Criminal Complaint No.1105/2015 titled as

“Dharam Singh Vs. M/s Pal Infrastructure Pvt. Ltd. and another”. It was pleaded by the complainant that on the persuasion of the accused, he invested various amounts from time to time in the company of the accused on the assurance that he would receive ₹3 lakh after a period of one year over investment amount of ₹10 lakh and that after lapse of two years, he (Complainant) will be entitled to receive ₹10 lakh besides ₹3 lakh as assured return. As per the complainant, he invested total amount of ₹1,40,00,000/- on different dates, out of which ₹1,09,35,000/- was paid through different cheques as per the details given in para-No.2 of the complaint and rest of the amount was paid in cash. On completion of one year, complainant received some of the amount and after completion of the time period of the scheme, when complainant requested the accused to pay the remaining assured amount, accused at the end of February 2015 assured to pay total amount of ₹1,80,00,000/- as the assured along with principal amount invested by the complainant. In order to discharge the legal liability, accused No.2-Harpal Singh on behalf of accused No.1-company handed over following cheques to the complainant from his account No. CA000763306871, drawn on Indian Bank, Branch at Sushant Lok-1, Gurgaon: -

Cheque No.	Dated	Amount (in ₹)
613233	15.03.2015	2,50,000
613189	15.03.2015	15,00,000
613188	15.03.2015	1,50,000
613201	18.04.2015	1,00,000
613198	18.04.2015	1,00,000
613205	15.06.2015	80,00,000
216598	15.06.2015	23,50,000

(ii) It was further pleaded by the complainant that at the time of handing over the cheques, complainant was assured of their encashment on

presentation. Later on, accused approached the complainant informing about some funds problem and requested him to present the cheques in the month of June, 2015. On the said assurance and as per the promise of the accused, complainant deposited one of the cheques bearing No.613205 dated 15.06.2015 for ₹80,00,000/- with his banker i.e., Punjab National Bank, Sector 49, Gurgaon for realization. However, the cheque was returned unpaid vide bankers return memo dated 25.06.2015 with endorsement '*funds insufficient*'.

(iii) Complainant informed the accused about the dishonour of the cheque and also met him personally, but the accused kept on lingering the matter at one pretext or the other and did not take any step to clear the legal and enforceable liability towards the complainant. Complainant then issued a legal notice dated 15.07.2015 through his advocate and sent the same to the accused on his address through registered post, asking the accused to pay the cheque amount within 15 days from the date of receipt of the notice. Despite serving the notice, accused failed to make any payment and hence, the complaint so as to summon and prosecute the accused under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 [for short 'the NI Act'] and Section 420 of the Indian Penal Code, 1860.

5. After recording preliminary evidence, accused were summoned to face prosecution under Section 138 of the NI Act vide order dated 19.08.2015. On the application moved by the complainant, production warrant of the accused Harpal Singh was issued, as said accused was in custody in some other case. Accused was produced before the Court on 23.12.2015 and was allowed bail. Notice of accusation was served upon the

accused under Section 138 of the NI Act on 25.01.2016, to which he pleaded not guilty and claimed trial.

6. Complainant examined himself as CW1 and relied upon documents Ex.C1 to C to C14, supporting the complaint version. Complainant further examined Dwarkesh Muchhal, Assistant Manager, Indian Bank, Sushant Lok Branch, Ph-I, Gurgaon, as CW2, who proved documents Ex.CW2/1 to Ex.CW2/6.

7. After closure of evidence by the complainant, statement of the accused under Section 313 CrPC was recorded, confronting him with all the incriminating circumstances appearing against him. The accused did not dispute either his signature or the issuance of cheque, but stated that the cheque was given as a security, which has been misused by the complainant by filing this complaint. Accused pleaded further that he is in judicial custody since March 2015 and that his account was freezed by the Court vide order dated 10.03.2015 (CW2/3), regarding which intimation was also sent to the banker. He also pleaded that he being in judicial custody since March 2015, so there was no occasion for him to have received the legal notice regarding dishonour of the cheque. With this stand, accused pleaded his false implication and that he did not have any liability towards the complainant.

8. To prove his defence accused examined one Ajay Balhara, Assistant Superintendent, District Jail, Bhondsi at Gurgaon, who proved custody certificate Ex.DW1/A revealing that petitioner is in custody since 11.04.2015.

9. After hearing both the sides and appraising the record, ld. JMIC vide judgment dated 20.8.2016 held the accused to be guilty and

convicted him under Section 138 of the NI Act. Vide a separate order dated 23.08.2016, the accused was sentenced to undergo simple imprisonment for a period of 2 years for committing offence under Section 138 of the NI Act and also to pay an amount of ₹1,20,00,000/- as compensation to the complainant. It was further directed that in case of non-payment of compensation amount, the accused was to further undergo imprisonment for a period of 6 months.

10. Against the aforesaid judgment and order of conviction /sentence, appeal was preferred by the accused. That Criminal Appeal No.58 of 31.08.2016 was disposed of on 02.11.2019, whereby though the conviction of the accused-petitioner was maintained under Section 138 of the NI Act, but the sentence was modified. After noticing that appellant-accused was aged about 65 years and was facing trial since 2015 and had already suffered more than 3 years custody, the substantive sentence and the compensation clause were kept intact, but the sentence awarded to be convict in default of payment of compensation was set aside and it was held that on non-payment of compensation amount, the complainant will be at liberty to get the same realized by way of attachment and sale etc. of the properties of the accused as per law and so, in default of payment of compensation, the convict-appellant need not undergo any kind of further imprisonment.

11. (i) Assailing the above said judgment dated 02.11.2019 passed by the Id. ASJ, Gurugram, maintaining the conviction and sentence except modification in respect of default sentence, it is contended by Id. counsel that both the Courts below failed to appreciate the factual and legal controversy involved in the case in the light of the evidence available on

record in right prospective. It was ignored that at the time of presentation of the cheque, the bank account of the petitioner was already freezed by the order of the Court, although the cheque was returned with remarks as 'funds insufficient'. Ld. counsel contends that in other cases, remarks have been given by the same bank either as 'attachment order/Court order'. It is urged that since the account of the petitioner was already freezed at the time of presentation of the cheque, so basic ingredients of Section 138 of the NI Act are not made out.

(ii) Ld. counsel contended further that the principle of 'payment stopped' or 'payment blocked' or 'account closed' could not have been applied in this case, because the petitioner was not in control of his account and so, he was not in a position to maintain the account. Ld. counsel has relied upon a decision of this Court rendered in *Rajesh Meena Vs. State of Haryana and others, 2020(3) RCR (Criminal) 888*; and *Vijay Chaudhary Vs. Gyan Chand Jain, 2008(4) RCR (Criminal) 159*.

(iii) Ld. counsel further contends that petitioner was in judicial custody since 11.04.2015, so there could be no question of serving of legal notice dated 14.07.2015 upon the petitioner, as said legal notice was not sent to him in jail for service. It is urged that ld. Courts below have wrongly relied upon *CC Allavi Hazi Vs. Plapetty Muhammed and another, 2007(3) RCR 186* for paying the cheque amount within 15 days from the date of the summons because the bank account, properties, assets and all financial resources of the accused had already been seized by the Court in various criminal cases.

(iv) Still further, it is argued that it was a case of security cheque, which had been misused by the complainant.

With these submissions, it is contended that judgments of the Courts below are based upon conjectures and surmises and so, prayer is made to set aside the same and to dismiss the complaint by allowing the revisions.

12. (i) Respondent-complainant opposed the revisions by making appearance through counsel. Ld. counsel has placed on record his written submissions. It has been urged that remarks on return memos in all the 12 cases are not the same, as will be evident from the following table: -

Criminal Revision No.	Complaint No.	Cheque N:	Date of return memo	Remarks on the banker's memo
3456/2019	1105/2015	613205	21.09.2015	Funds Insufficient
3479/2019	1104/2015	216598	25.06.2015	Funds Insufficient
1421/2022	2724/2015	613218	24.06.2015	Funds Insufficient
1760/2022	549/2015	613217	14.02.2015	Funds Insufficient
3515/2019	1103/2015	613189	19.06.2015	Payment stopped by Court order
3471/2019	1101/2015	613198	19.06.2015	Payment stopped by Court order
3466/2019	1100/2015	613233	19.06.2015	Payment stopped by Court order
3474/2019	1106/2015	613201	19.06.2015	Payment stopped by Court order
3484/2019	1102/2015	613188	19.06.2015	Payment stopped Court order
3481/2019	1109/2015	613234	21.09.2015	Payment stopped by drawer
3476/2019	1107/2015	216565	21.09.2015	Payment stopped by drawer
3520/2019	1108/2015	613231	21.09.2015	Payment stopped by drawer

(ii) Contention is that there are three types of situations arising out of different remarks on Banker's return memos, which are: (i) 'funds insufficient', (ii) 'payment stopped by Court order' and (ii) 'payment stopped by drawer', and therefore, all the cases cannot be decided jointly. It is contended that no evidence has been led by the petitioner-accused regarding the reason behind the dishonour of cheque. It is urged that in fact, when all these cheques were presented, there was no sufficient funds in the account of the accused-petitioner as will be evident from the statement of Bank account Ex.CW2/4.

(iii) By referring a decision of Himachal Pradesh High Court in *Nexus Health & Beauty Care Private Limited & another Vs. National Electrical Office” 2012(18) RCR (Criminal) 793*, it is contended that even if a cheque has been dishonoured due to *payment stopped by attachment order/Court order*, still there is presumption under Section 139 of the NI Act, which of course can be rebutted by the accused by producing the defence that he had sufficient funds in his account at the time of attachment order of the Court and that burden in this regard is upon the accused. It is urged that in this case, accused has not led any evidence that at the time when the account of the accused was freezed by any order, he had sufficient amount in his account or had any arrangement with his banker.

(iv) Ld. counsel for respondent – complainant has further contended that second situation of *‘payment stopped by drawer’* has been dealt with by Hon’ble Supreme Court in *M.M.T.C. Ltd. and another Vs. Medchl Chemicals and Pharma (P) Ltd. and another, (2002) 1 SCC 234*, by holding that any such instructions to stop payment issued by the accused, will attract Section 138 of the NI Act. Ld. counsel has urged that in the case of third situation i.e., *‘funds insufficient’* there is numerous case law that Section 138 of the NI Act is clearly applicable.

(v) It has been further argued that legal notices in all the cases were sent to the accused at his address through registered post and so, there is presumption under Section 27 of the General Clauses Act regarding due service thereof. Even if, the accused was in custody at the relevant time, he could have made offer to make payment within 15 days, after his first appearance before this Court, but he did not do so and so, Courts below have rightly relied upon the case of *CC Allavi Hazi (Supra)*.

(vi) Still further, it is argued that no evidence in defence has been adduced by the accused to prove the misuse of the cheque and that evidence produced by the complainant-respondent was more than sufficient to prove the legal and enforceable liability of the accused-petitioner.

With all these submissions, the judgments of conviction and orders of sentence passed by Id. Courts below have been defended and prayer is made for dismissal of all the revision petitions.

13. I have considered submissions of both the sides and have appraised the record carefully.

14. Ex.C1 to C8 are copies of bank statements of the complainant showing the transfer of the amount in the account of the accused from time to time by way of different cheques. It has been specifically testified by the complainant as CW1 that he invested total amount of ₹1,40,00,000/- with the accused on different dates, out of which ₹1,09,35,000/- was by way of different cheques, whereas the remaining amount was by way of cash. Ex.C9 is the copy of cheque No.613205 dated 15.06.2015 for an amount of ₹80,00,00/- of account No.CA000763306871 of M/s Pal Infrastructure Pvt. Ltd. drawn on Indian Bank, Sushant Lok, Gurgaon. The said cheque favouring the complainant had been issued by accused Harpal Singh as authorized signatory of M/s Pal Infrastructure Pvt. Ltd. Ex.C10 is the return memo dated 24.06.2015 revealing that cheque was dishonoured with a remark 'funds insufficient'. Ex.C11 is copy of the legal notice dated 14.07.2015 sent by the complainant through his advocate Devinder Singh to the accused demanding payment of the cheque amount within 15 days from the date of receipt of the notice. Ex.C12 to C14 are the copies of postal receipts to show that legal notice was sent through registered post. All these

documents are proved by the testimony of CW1 Dharam Singh-complainant.

15. During his cross-examination, it has been disclosed by CW1 Dharam Singh-complainant that he had also lodged FIR against the accused raising allegation of cheating. He also disclosed that 7 of the cheques were given to him in January 2015 and 3 in February 2015. He specifically deposed that all the cheques were issued and filled by accused himself in his own handwriting and that he (complainant) did not fill even a single particular in any of the cheques on his own or with the help of another person. CW1 Dharam Singh-complainant pleaded ignorance as to whether the account of the accused was seized by any Court order.

16. CW2 Dwarkesh Muchhal, Assistant Manager, Indian Bank, Sushant Lok Branch, Ph-I, Gurgaon proved a notice dated 10.02.2015 issued by Police Station, DLF, Phase I, Gurgaon, whereby the Banker of the accused i.e., Indian Bank was asked to handover the account statements of two accounts bearing No.763306871 and 722748467 and the bank was further asked to seize the said two accounts. Said notice was issued under Section 91 of the CrPC. CW2 also produced statement of account No.763306871 as Ex.CW2/4 of M/s Pal Infrastructure Pvt. Ltd. besides account opening form Ex.CW2/5 and the account statement for the period from 01.10.2013 to 31.03.2016 as Ex.CW2/6. During cross-examination, CW2 admitted that Bank account bearing No.763306871 and 722748467 had been freezed in case FIR No.343 dated 11.11.2014 of DLF, Phase-I, Gurgaon by the ld. Court order and that these accounts had not been de-freezed even once since 10.03.2015.

17. DW1, the witness examined on behalf of the accused, namely, Ajay Balhara, Assistant Superintendent, District Jail, Bhondsi at Gurgaon proved Jail certificate Ex.DW1/A, as per which accused-petitioner Harpal Singh is confined in District Prison, Gurgaon since 11.04.2015. As per the certificate Ex.DW1/A, the accused was involved in as many as 88 cases, out of which 16 cases pertain to complaints under Section 138 of the NI Act, whereas most of the cases have arisen out of different FIRs registered under Sections 406, 420, 204 & 120B IPC and Section 3 of the Haryana Protection of Interest of Depositors in Financial Establishment Act No.32 of 2013.

18. As has been noticed earlier that accused-petitioner has not disputed his signature on any of the cheques, though he had pleaded the misuse of the same by contending that it was a security cheque. Once the signatures on the cheque are admitted, presumptions under Section 139 read with Section 118 of the NI Act are clearly available to the complainant/respondent. These provisions read 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;”

19. In ***Goa Plast (P) Ltd. Vs. Chico Ursula D’souza & Anr 2003***

(3) SCC 232, Hon’ble Supreme Court has held that the provisions of

Section 138 to 142 of the N.I. Act, is for the purpose of giving credibility to negotiable instruments in business transactions. In view of section 139 of the NI Act, it has to be presumed that a cheque is always issued in discharge of any debt or other liability. The presumption could be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption.

20. In *Rangappa vs. Sri Mohan, 2010 (11) SCC 441*, a three judges' 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. 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.”

21. It may be clarified here itself that accused is obliged to set up a probable defence, which 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.

22. In ***Basalingappa Vs. Mudibasappa 2019 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.*

23. 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.

Here itself, it may be noted that the accused is not required to prove his defence on the standard of proof 'beyond reasonable doubt' and rather, he is simply required to probabalise his defence. The presumption under Section 139 of the Act can be rebutted even by evidence led by the complainant; and it is not required for the defence to lead evidence to rebut presumption, as has been held in *Pawan Kumar Vs. Sunil Kumar 2020 (1) CCC 391* by this court and also by the Hon'ble Supreme Court in *Shiv Kumar Vs. Ram Avtar Aggarwal, 2020(2) RCR (Crl.) 147*.

24. Three submissions made by the petitioner are: (i) his accounts were already seized, when the cheques were presented for encashment; (ii) non-receipt of the legal notice; and (iii) misuse of security cheques.

25. Although cheques in question in all the 12 cases have been dishonoured for three different reasons i.e. (i) funds insufficient; (ii) payment stopped by Court; and (iii) payment stopped by drawer, but it is revealed that return memos in all the cases (except one) have been issued during June 2015 to September 2015. It is only in CRR-1760-2022 that return memo is dated 14.02.2015 with remarks 'funds insufficient'. As per the evidence on record, the accounts of the accused were seized on 10.03.2015 vide Ex.CW2/3. The question arises as to whether on account of seizure of the account of the accused, Section 138 of the NI Act will be made out or not.

26. In *NEPC Micon Ltd. Vs. Magma Leasing Ltd. 1999 (2) R.C.R.(Criminal) 648*, the Hon'ble Supreme Court had considered as to whether Section 138 NI Act is applicable, when was dishonoured for the reason that '*account was closed*'. It was held as under: -

"Further, the offence will be complete only when the conditions in the proviso (a), (b) and (c) are complied with. Hence, the question is, in a

case where cheque is returned by the bank unpaid on the ground that the account is closed, would it mean that cheque is returned as unpaid on the ground that the amount of money standing to the credit of that account is insufficient to honour the cheque. In our view, the answer would obviously be in the affirmative because cheque is dishonoured as the amount of money standing to the credit of that account was nil at the relevant time apart from it being closed. Closure of the account would be an eventuality after the entire amount in the account is withdrawn. It means that there was no amount in the credit of that account on the relevant date when the cheque was presented for honouring the same. The expression the amount of money standing to the credit of that account is insufficient to honour the cheque is a genus of which the expression that account being closed is specie. After issuing the cheque drawn on an account maintained, a person, if he closes that account apart from the fact that it may amount to another offence, it would certainly be an offence under Section 138 as there was insufficient or no fund to honour the cheque in that account. Further, cheque is to be drawn by a person for payment of any amount of money due to him on an account maintained by him with a banker and only on that account cheque should be drawn. This would be clear by reading the Section along with provisos (a), (b) & (c)."

27. In the above case before Hon'ble Supreme Court, proceedings were challenged on the ground of maintainability of complaint, as the cheque was dishonoured because account stood closed. Hon'ble Supreme Court held that the provisions of Section 138 NI Act cannot be interpreted narrowly because if argument of the drawer is accepted, it would defeat the legislative intent.

29. The situation, when the cheque in question was dishonoured due to 'stop the payment' by drawer, would be punishable under Section 138 NI Act was considered by the Hon'ble Supreme Court, in ***M.M.T.C Ltd. and Anr Vs. Medchl Chemicals and Pharma (P) Ltd. and Anr, 2001 (1) SCC 234***, wherein it was held as under: -

*“It has been held that even though the cheque is dishonoured by reason of 'stop payment' instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows **that even when the cheque is dishonoured by reason of stop payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course, this is a rebuttable presumption. The accused can thus show that the "stop payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then an offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus, a Court cannot quash a complaint on this ground.**”*

30. It is, thus, clear from the authoritative pronouncements of Hon'ble Supreme Court that Section 138 of the NI Act will be applicable even if the cheque has been dishonored either for the reason that account was closed or that drawer had stopped the payment.

31. In order to contend that this legal position cannot be applied in a case, when the account has been freezed/ seized by the Court or any other competent authority, learned counsel for the petitioner has referred to ***Rajesh Meena's case (supra)***. In that case before a co-ordinate Bench of this Court, proceedings against the Company were initiated under the provisions of Insolvency and Bankruptcy Code, 2016 (for short 'IBC 2016') and order in terms of Section 14 of the IBC 2016 was passed on 21.07.2017. It was noticed by the Court that IRP had already been appointed, who was seized of the management and operation of the corporate debtor and that post dated cheques in question were given but

prior to the effective dates, the account was blocked, which could not be attributed to the account holder, as it was a result of the order passed by the NCLT, by virtue of which the authority and control of the account holder over the account ceased to exist. It was in these background facts that this Court observed as under: -

“The expression "account maintained by him" as appearing in Section 138 of NI Act carries great significance and meaning. The dictionary meaning of “Maintain” (as contained in Oxford Dictionary) is defined as: - the act of making the state or situation continue. Therefore, the said expression “account maintained by him” cannot be construed narrowly to mean that if the account belongs to the accused, the necessary ingredient would be complete. This expression “account maintained by him” must necessarily include that the said account is not only alive and operative, but the account holder is capable of executing command to govern the financial transactions which include the clearance of cheques etc. The authority and control of the account holder upon the account must exist on the effective date i.e., when the cheque becomes valid for presentation in the bank. It is settled law that mere issuance of a cheque is not an offence, but it becomes punishable when the said cheque is dishonoured. Mere fact that the record of the drawer bank shows a particular name as account holder would not be sufficient to establish that account is being maintained by the account holder, unless the said account holder holds the authority and control over the said account. In other words, if an account holder is deprived off his authority, control and dominion over the bank account, it cannot be said that the account is being maintained by the said account holder.”

32. I am afraid that above-said observations are not applicable to this case, as the facts are quite distinguishable. It is true that vide Ex.CW2/3, the two accounts of the petitioner had been seized on 10.03.2015 under Section 91Cr.P.C and as per the cross-examination of CW2, the said accounts were seized due to the Court order, but at the same time, the perusal of the bank account statement of the petitioner Ex.CW2/6 for the period 01.01.2013 to 27.03.2016 would reveal that at no point of

time, the said account had the amount so as to honour the cheques in question i.e. either before seizure of the account by the Court/ Police or thereafter. It is revealed that the amount in the account at the time of seizure was ₹62,287/- only. Not only this, during this entire period of 01.01.2013 to 27.05.2016, the maximum amount at any given time in the account of the petitioner was only ₹18,52,033/- on 22.03.2014. This figure clearly indicates that at no point of time, petitioner had sufficient funds in his account so as to honour any of the cheques.

33. Further, even if the account had been seized by the Court order, as is contended by counsel for the petitioner, there is absolutely no evidence that there was any attempt on part of the petitioner to move any application before the Court concerned to release the account. No proceedings under IBC 2016 had been initiated in this case nor any IRP had been appointed like in ***Rajesh Meena's case (supra)*** and thus, account was very much in control of the petitioner, though he was required to move appropriate application before the Court concerned for releasing the account.

34. Ld. counsel for the petitioner has also referred to ***Vijay Chaudhary (Supra)***, wherein Delhi High Court took the view that when the bank account is attached by the order of the court, then accused will not be liable under Section 138 of the NI Act. Ld. counsel has specifically referred to the following observations made by the Delhi High Court: -

23. Turning to the facts of the present case, one finds that the attachment by an order of the Court in this case was after the alleged issuance of the cheque, but prior to its presentation for encashment. The attachment of the bank account of the petitioner had the effect of disabling the petitioner from operating or maintaining the said account. The petitioner could not exercise his right either to deposit into or with draw from the said account.

Even if it were to be assumed for the sake of argument, that the cheque was in fact issued in discharge of the petitioner's liability owed to the respondent, and that at the time of issuance of the cheque, he did not have sufficient balance in the account, or an arrangement with his banker, in case the bank account had not been attached under the orders of a Court, nothing prevented the petitioner from either depositing money in his account or entering into an agreement with his bank to arrange for sufficient funds in the account, to be able to honour the cheque in question by the date when the said cheque could have been presented for payment at the earliest. This is so because there was sufficient time gap i.e. of nearly one year and eight months between the date of alleged issue of cheque and the date of its presentation. As held by the Hon'ble Supreme Court in Modi Cements (supra), the issuance of the cheque without having sufficient balance in the account of the drawer does not by itself tantamount to the commission of an offence under section 138 of the Act. However, in the facts of this case, the petitioner could not have, even if he would have so desired, either deposited funds in his account or otherwise made arrangements for the payment of the cheque upon its presentation by entering into an agreement with the bank, since there was a Court attachment on the bank account of the drawer. This Court attachment was by a Court ceased of the case arising out of FIR No. 283/2005 under section 406/420/467/468/471 and 120B Indian Penal Code registered with P.S. Connaught Place. The act of attachment of the bank account of the drawer/petitioner cannot be said to be a voluntary act of the drawer. It cannot be said that the petitioner contrived to have the account attached only for the purpose of warding off the penal consequences under section 138 of the Act. It also cannot be said that after the attachment of the bank account, the same was being maintained by the petitioner. For an account to be maintained by an account holder, it is essential that he is in a position to operate the said account by either depositing monies therein or by withdrawing money therefrom. He should be in a position to give effective instructions to his banker with whom the account is maintained. However, in the present case, once the account has been attached by an order of the Court, the said account could not be operated by the petitioner. He could not have issued any binding instructions to his banker, and the banker was not obliged to honour any of his instructions in

relation to the said account, so long as the attachment under the court orders continued.”

35. Contention of ld. counsel for the petitioner is that in the present case also, the cheques in question had been given to the complainant in January/February 2015 as per his Statement. The cheques were payable during June to September 2015, but before the cheques became payable, the account of the petitioner was seized on 10.03.2015 as per Ex.CW2/3. As per the contention, petitioner was left with no control over his bank account either to deposit the funds or to make arrangement with the bank by entering into any agreement with the Bank and that act of attachment of the bank account was not the voluntary act on the part of the petitioner and so, he cannot be held liable

36. I am afraid that this Court does not find any merit in the aforesaid submissions, having regard to the factual position of this case. It has already been noticed that as per the bank account statement Ex.CW2/6 for the period 01.01.2013 to 27.03.2016, petitioner did not have the amount in his account so as to honour the cheque in question at any point of time, either before seizure of the account by the Court/police or thereafter. Further the cheques were handed over in January/February 2016 only and the account was seized in March 2015. Neither at the time of handing over the cheques nor at the time of seizure nor at the time when the payments became due under the cheque, the petitioner had the sufficient amount in his account. It is not the defence of the petitioner that he wanted to make arrangement with his bank so as to honour the cheques.

37. At this stage, it will also be relevant to refer to certain observations made by Hon’ble Supreme Court in ***D. Vinod Shivrappa Vs.***

Nanda Beelliappa, 2006 (3) RCR (Criminal) 145, while interpreting proviso to Section 138 of the NI Act. The observation read as under: -

*"13. Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. Apart from civil liability, a criminal liability was imposed on such unscrupulous drawers of cheques. The prosecution, however, was made subject to certain conditions. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to Section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 15 days time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted. The object which the proviso seeks to achieve is quite obvious. It may be that on account of mistake of the bank, a cheque may be returned despite the fact that there is sufficient balance in the account from which the amount is to be paid. In such a case if the drawer of the cheque is prosecuted without notice, it would result in great in-justice and hardship to an honest drawer. One can also conceive of cases where a well-intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. **The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it***

being a part of their modus operandi to cheat unsuspecting persons."
(Emphasis added).

38. Even Delhi High Court in *Vijay Chaudhary (Supra)* referred to the above said observations of Hon'ble Supreme Court in *D. Vinod Shivrappa (Supra)* case and noted that the aforesaid extract clearly shows that Hon'ble Supreme Court consciously used the words "*which was demonstrated by the fact that there was no sufficient balance in the account to discharge their liability*". This observation of the Hon'ble Supreme Court is sufficient to show that whatever be the reason for dishonour of the cheque, it has to be correlated with the insufficiency of funds in the account or to the lack of the arrangement made by the drawer with his bank under an agreement. Accused cannot be allowed to plead that had his account been not seized, he could have deposited the amount or that he could have made necessary arrangement with the banker. What is necessary to take note is that at the time when the account was seized or when the cheque was presented, there was no sufficient fund in the account of the accused.

39. Here, it will also be useful to refer to the observations made by Hon'ble Supreme Court in *Pankaj Mehra And Anr. vs State Of Maharashtra 2000 CrI.L.J 1781 (SC)*. Their lordship held as under:

"The last factor for constituting the offence under [Section 138](#) of the NI Act is formulated in clause c of the proviso to the Section which reads thus : "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."

The words "the drawer of such cheque fails to make the payment" are ostensibly different from saying "the drawer refuses to make payment". Failure to make payment can be due to the reasons beyond the control of the drawer. An illustrative case is, if the drawer is not a company but individual who has become so pauper or so sick as he cannot raise the money to pay the demanded sum. Can he contend that since failure to make payment was on

account of such conditions he is entitled to be acquitted? The answer cannot be in the affirmative though the aforesaid conditions can be put forth while considering the question of sentence.

We therefore feel that legislature has thoughtfully used the word "fails" instead of other expressions as failure can be due to variety of reasons including his disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause for such failure.

The drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque. But no such explanations would be sufficient to extricate him from the tentacles of the offence contemplated in the Section. Perhaps same kind of explanations would be sufficient to alleviate the rigor of the offence which may be useful to mitigate the quantum of sentence to be imposed. But that is no ground for consideration at this stage."

40. Applying the same analogy, it is held that simply because drawer of the cheque is unable to pay the cheque amount, due to the fact that account stood freezed cannot be the reason to exonerate the liability of the accused - petitioner.

41. Similar view has also been taken by Himachal Pradesh High Court in the case of ***Nexus Health & Beauty Care Private Limited & another (Supra)***. In that case also, it was contended on behalf of the petitioner-accused that cheque was returned on account of payment stopped due to attachment order/Court order and not due to insufficient funds and therefore, they cannot be prosecuted under Section 138 of the NI Act for bouncing of the cheque. Negating the said contention, it was held that presumption under Section 139 of the NI Act is available in such case also because Section 140 of the NI Act excludes the defence that accused had no reason to believe that cheque would be dishonoured for reasons stated in Section 138 of the Act.

42. Section 140 of the Act reads as under: -

40. Defence which may not be allowed in any prosecution under section 138. —*It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.*

43. Thus, plain language of Section 140 of NI Act would clearly reveal that a drawer of the cheque cannot be allowed to take the plea as a defence in prosecution for an offence under Section 138 of the Act that he did not have any reason to believe when he issued the cheque that it may be dishonoured on presentation. It has already been noticed that in present case, neither at the time when the cheques were handed over to the complainant nor at the time when the account of the accused was seized by the Court nor at the time of presentation, there was sufficient funds in the account of the petitioner and therefore, under the garb of the order of the Court seizing the account, petitioner cannot be allowed to plead that he is not liable under Section 138 of the NI Act.

44. Another contention raised by ld. counsel for the petitioner is that petitioner was in custody ever since 11.04.2015 as per the custody certificate proved on record by DW1 and therefore, there could be no question of serving legal notice at the address mentioned in the notice and that no attempt was made to serve the legal notice upon him in the jail. This is true that accused was in custody in another case since 11.04.2015, so it may be assumed that legal notice was not served upon him because it was never sent through the Superintendent of the concerned Jail to the accused and rather, it was sent to him at his address. However, again this fact will not exonerate the petitioner.

45. In the case of *CC Allavi Hazi (Supra)*, the accused was abroad at the time when notice was sought to be served upon him. Contention was raised that legal notice having not been served, so accused was not liable.

Hon'ble Supreme Court observed 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."

46. Hon'ble Supreme Court further held as under:

"In the instant case, the averment made in the complaint in this regard is: Though the complainant issued lawyer's notice intimating the dishonour of cheque and demanded payment on 4.8.2001, the same was returned on 10.8.2001 saying that the accused was out of station. True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by registered post acknowledgement due. But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that the addressee was abroad. We are of the view that on

facts in hand the requirements of Section 138 of the Act had been sufficiently complied with and the decision of the High Court does not call for interference.”

47. In present case, as per trial court record, the accused was produced in the Court of Id. JMIC, Gurgaon for the first time on 23.12.2015 pursuant to the production warrants issued for him. There is nothing on record to suggest that at any point of time, petitioner-accused ever pleaded before the Court that though he had not received the legal notice, but he was ready to make payment of the cheque amount or that he be allowed to make necessary arrangement with the Bank so as to make payment of the cheque amount. No attempt appears to have been made on the part of the accused to move appropriate application before the concerned Court for getting his account released. In fact, the seizure of the account by the Court in the criminal case came as a boon for the petitioner because he factually did not have any amount in his account at any point of time so as to honour the cheque and on account of seizure of the account, he got the excuse to plead before the Court that his account has been seized.

48. It has also been contended by Id. counsel for the petitioner that petitioner was not in a position to make payment within 15 days after his production in the Court, as apart from his bank account, all his properties, assets and financial resources had been seized by the Court in various criminal cases and even residential houses had been attached by this Court.

49. I am afraid that the said contention raised by the petitioner for the first time in this Court is beyond pleadings. No such defence had been taken by the accused in his statement under Section 313 CrPC to the effect that apart from his bank account, his other assets or financial resources or

properties etc. had been seized by the Court in various criminal cases nor any evidence to support this contention is available on record.

50. The last contention raised on behalf of the petitioner is that cheques had been misused as these were issued as a security cheque. The contention is again without any merit as it has been specifically testified by CW1 – complainant that all the particulars in the cheques were filled in by the accused himself. Even if it is presumed for the sake of arguments that cheques were issued as a security, the dishonour thereof will still attract Section 138 of the NI Act. In ***Shalini Enterprise Vs. Indiabulls Financial Services Ltd., 2013 (2) Civil Court Cases 835***, similar plea of security cheque was taken. It was held by this Court: -

“11. Additional plea of the petitioner that dishonour of a security cheque cannot fasten the liability on the drawer under the Negotiable Instruments Act is also not acceptable. There can be no doubt regarding the fact that the security cheque is an integral part of the commercial process entered into between the Petitioner and Respondent/Complainant. The security cheque is not only a deterrent for the drawer against dishonoring his financial commitment but can also be legally and validly utilized towards the discharging of the liability of the Drawer. It cannot by any stretch be argued that a security cheque is not handed over or issued in pursuance of any undischarged liability. To hold so would defeat the whole purpose of a security cheque. In the considered opinion of the Court, a security cheque is an acknowledgment of liability on the part of the drawer that the cheque holder may use the security cheque as an alternate mode of discharging his/its liability. Thus, the argument of the learned counsel for the petitioner that on dishonouring of a security cheque no offence punishable under section 138 of the Negotiable Instruments Act is made out.”

51. No other point was raised.

52. Consequent to entire discussion as above, this court finds no merit in any of these revisions. Same are dismissed. Pending application(s), if any, also stand disposed of.

Pending application(s) in all the Civil Revision Petitions, if any, shall stands disposed of.

12.10.2023

Vivek

(DEEPAK GUPTA)
JUDGE

1. Whether speaking/reasoned?

Yes
2. Whether reportable?

Yes