

2025:PHHC:042379



IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-2563-2010 (O&M)

Reserved on: 24.03.2025

Pronounced on: 27.03.2025

GIAN CHAND GARG

. . . . Petitioner

Vs.

HARPAL SINGH AND ANOTHER

. . . . Respondent

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Argued by: - Mr. A.S. Virk, Advocate, for the petitioner.

Mr. Keshav Pratap Singh, Advocate, with
Mr. Nitin Sansanwal, Advocate, for respondent No.1.

Mr. R.K.S. Brar, Addl. A.G., Haryana.

DEEPAK GUPTA, J.

In criminal complaint filed by Harpal Singh (*respondent herein*), accused-Gian Chand Garg (*petitioner herein*) was convicted by Id. JMJC, Kurukshetra under Section 138 of the Negotiable Instruments Act, 1881 [for short 'the NI Act'] vide judgment dated 21.04.2010 and was sentenced to undergo simple imprisonment for a period of 6 months and to pay fine of ₹1000/- with default sentence of 15 days imprisonment vide order of the even date. Fine was paid.

2. Against this conviction and sentence, appeal was preferred by the accused (*petitioner herein*), but the same was dismissed by the Id. Additional Sessions Judge, Kurukshetra vide order dated 14.09.2010, thus affirming the conviction as well as sentence.

3. Against the aforesaid judgment of conviction and order of sentence passed by the trial Court and as affirmed by the appellate Court, the present revision has been filed by the accused.

4. As the paper-book would reveal, the case of the complainant i.e. *respondent herein* was that an amount of ₹5 lakh had been borrowed by the accused-*petitioner herein* and in order to pay the same, accused had issued cheque No.933572 dated 15.10.2003 drawn on Punjab National Bank, Ratgal, Tehsil Thanesar, District Kurukshetra to discharge the liability. However, on presentation, the cheque was dishonoured by Banker of the accused on 31.12.2003 with endorsement of 'insufficient funds'. Complainant approached the accused and requested him to make payment of the cheque amount, but he postponed the matter and then complainant issued a legal notice dated 19.01.2004 under Registered AD cover but the accused did not receive the same and it was returned to the complainant. With these allegations, complaint was filed.

5. After recording preliminary evidence, accused was summoned. On his appearance, notice of accusation under Section 138 of the NI Act was served upon him, to which he pleaded not guilty and claimed trial. Complainant produced evidence in support of his case. Accused in his statement under Section 313 CrPC alleged false implication. After hearing both the sides, Id. Magistrate found the accused to be guilty and convicted him under Section 138 of the NI Act and sentenced him thereunder as per the details given earlier and the same has been affirmed by the appellate Court.

6.1 Assailing the aforesaid findings, Id. counsel contends that legal notice prior to filing of the complaint was not served upon the accused-petitioner, inasmuch as it was reported by the postal employee that addressee was on leave and so, the notice was returned unclaimed. It is contended that since the legal notice was not served upon the accused, therefore, the complaint was premature.

6.2 Another contention made by Id. counsel is that the return memo issued by the bank does not bear the stamp of the bank and as such, it cannot be relied.

6.3 It is also the contention that loan as allegedly advanced by the complainant, was neither entered by the complainant in his account books nor was shown in his Income Tax Returns and so, the case pleaded by the complainant was not reliable.

6.4 With these submissions, Id. counsel prays for setting aside the conviction as well as order of sentence.

7.1 Refuting the aforesaid contentions, Id. counsel for the respondent contends that the entire evidence as examined by the trial Court was re-appreciated by the Appellate Court and no illegality or perversity was found in the findings. It is contended that even if the legal notice sent to the accused prior to filing of the complaint could not be served upon him as he was on leave, the filing of the complaint itself amounts to serving of the notice and that accused could have made the payment within 15 days after being served of the complainant. Id. counsel has relied upon ***C.C. Alavi Haji Vs. Palapetty Muhammed and another, 2007(3) RCR (Criminal) 185.***

7.2 It is further the contention of Id. counsel that the bankers return memo bears the date as well as signature of the issuing official of the concerned bank and that there is a presumption under Section 146 of the NI Act to the said memo and as such, the contention that the memo does not bear the stamp of the Bank is without any merit.

7.3 Id. counsel contends further that it was not a civil suit for recovery and so, it was not the legal requirement to produce the account books or Income Tax Returns. Once the signature of the accused on the cheque in question was not denied, there was a legal presumption under Section 139 of the NI Act and in the absence of any cogent evidence to rebut the same, the Courts below have rightly convicted the petitioner-accused.

7.4 Apart from above, Id. counsel for the respondent has further drawn attention towards the conduct of the petitioner-accused, inasmuch as said petitioner on 21.02.2025 produced two demand drafts for total amount of ₹5 lakh i.e. cheque amount for making payment to the

respondent-complainant and further stated that he shall pay another amount of ₹2 lakh to the complainant for compounding of the offence. Matter was adjourned to 28.02.2025. On the adjourned date, it was pointed out by counsel for the respondent-complainant that cheque of ₹5 lakh pertains to the year 2003 and even if interest is taken at 6% per annum, the total amount would be in excess of ₹11 lakh and that in case petitioner wished to settle the dispute, he ought to pay the said amount. Matter was adjourned. On 11.03.2025, counsel for the respondent-complainant modified the offer by stating that the complainant-respondent will be satisfied in case the petitioner-accused made total payment of ₹8 lakh including the amount of the cheque in question. Adjournment was taken by counsel for the petitioner to obtain necessary instructions, but on the next date of hearing, counsel for the petitioner, on instructions from the petitioner, stated that petitioner was not ready to pay the amount of ₹8 lakh. It is contended by Id. counsel for the respondent that this conduct of the petitioner in itself shows that he had admitted his liability and wanted to compound the offence and these circumstances itself show the falsity of the contentions being raised before this Court.

7.5 Prayer is accordingly made for dismissal of the petition.

8. This Court has considered submissions of both the sides and have appraised the record.

9. First of all, it may be noticed that revisional Court is not required to re-appreciate the evidence so as to interfere in the concurrent findings of facts recorded by the trial Court and the Sessions Judge. It has been held in **State Of Maharashtra vs Jagmohan Singh Kuldip Singh Anand & Ors : AIR 2004 SC 4412** as under:

“The Revisional Court is empowered to exercise all the powers conferred on the Appellate Court by virtue of the provisions contained in Section 410 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of Appellate Court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or

the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be, "for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceeding of such inferior court." It is for the above purpose, if necessary, the High Court or Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of Appellate Court on the Revisional Court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power."

10. Still further, in **Raj Kumar vs State Of H.P : AIR ONLINE 2008 SC 340**, Hon'ble Supreme Court held:

"8. In State of Orissa v. Nakula Sahu and Ors. (AIR 1979 SC 663) it was held that the High Court should not have interfered with the concurrent findings recorded by the Trial Court and the Sessions Judge in exercise of revisional jurisdiction when there was no error of fact or law arrived at by the Trial Court or the Sessions Judge. **In State of Kerala v. Puttamana Illath Jathavedan Namboodiri (1999 (2) SCC 452)** it was held that the revisional jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate Court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

11. In the light of the aforesaid legal position, when the impugned judgments are perused, this Court does not find any illegality or impropriety so as to interfere in the concurrent finding of fact, based on proper appreciation of evidence, resulting in conviction.

12. Still further, even if matter is considered on merits, it is noticed that petitioner does not dispute his signature on the cheque in question.

Once signature on the cheque are not in dispute, there is a presumption of legal liability under Section 139 of the Negotiable Instruments Act to be read with Section 118 of the Act, in favour of the complainant, though the said presumption is rebuttable.

13. Section 139 and Section 118 clause (a) & (b) of the Negotiable of Instruments Act 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;”

14. In ***Rangappa vs. Sri Mohan, 2010 (3) Criminal Court Cases 022 (S.C.)***, 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. 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."

15. It is in the light of the aforesaid legal position that it is required to be seen that whether accused has been able to probabalise 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 by the Hon'ble Supreme Court in ***Shiv Kumar Vs. Ram Avtar Aggarwal, 2020 (2) RCR (Crl.) 147.***

16. 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. 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).***

17. In present case, in order to rebut the presumption, petitioner

contended that complainant did not show the amount allegedly lent to the accused in his income tax returns or account books.

18. There is no merit in the contention, as it is not a civil case, where plaintiff is required to prove the debt. In ***Uttam Ram Vs. Devinder Singh Hudan 2019(4) CCC 596 (SC)***, 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.”

19. Similarly, in ***Rohitbhai Jivanlal Patel v. State of Gujarat & another (2019) 18 SCC 106***, it was 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."

20. 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 - petitioner has utterly failed.

21. Proceeding further, not showing the amount in his income tax returns as lent by the complainant to the accused in itself cannot be a ground to disbelieve the complainant, as non-mentioning of the loan amount in the Income Tax Returns may attract penal provisions of Income Tax Act but cannot be a reason to discard the case of the complainant. In this regard, reliance may be placed on **Ganga Prashad vs. Lalit Kumar, 2008(3) RCR (Criminal) 159**, wherein it was held by this High Court that the payment of loan could not be disbelieved on the ground that complainant did not reflect the amount in his income tax return.

22. In **C.N.Dinesha Vs. Smt. C.G.Mallika, 2017 Cr.R 530**, it was held by Karnataka High Court that the Culpability of offence under section 138 of Negotiable Instrument Act will not freeze for the reason of violation of section 269 of IT Act and nothing prevents operation of statutory presumption. Further, in a decision rendered in Writ Petition No.29144/2018 titled **Dr. M. Krishna Shetty Vs. Sri. H.R.Nagabhushan**, on 29th day of August 2018, Karnataka High Court has held that the prosecution under Section 138

of N.I.Act cannot be stalled for non-compliance of Section 269 SS of the Income Tax Act. Any cash transaction in violation of section 269 SS of Income Tax Act may give rise to an independent criminal offence, but on account of violation of the said provision, the prosecution of the petitioner for the alleged dishonour of cheque under Section 138 of Act does not become bad in law.

23. As far as the contention of counsel for the petitioner to the effect that legal notice was not served upon the accused is concerned, it has no merit. Even if it be assumed that petitioner was not served with the said notice despite the fact that it was sent at his correct address through registered AD cover, the due service has to be presumed as has been held by Hon'ble Supreme Court in the case of **C.C. Alavi Haji (Supra)**. In that case, it was held by Hon'ble Supreme Court as under: -

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. [Vide **Jagdish Singh Vs. Natthu Singh, AIR 1992 Supreme Court 1604; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V. Raja Kumari Vs. P.Subbarama Naidu & Anr. 2004(4) RCR (Criminal) 933; 2005(1) Apex Criminal 58: (2004)8 SCC 774**]. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the

accused or that the accused had a role to play in the return of the notice unserved.

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16. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In ***Vinod Shivappa (supra)***, this Court observed:

‘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.’

24. In view of the legal position as explained by Hon’ble Supreme Court, it is clear that once it has not been disputed by the petitioner-accused in this case that the address mentioned on the legal notice, on which it was sent, was not incorrect and the notice was returned as unclaimed for the reason that addressee was not found, due service is to be assumed. Even otherwise, in case the petitioner genuinely intended to honour the cheque drawn by him, and he could not do so due to non-receipt of the legal notice, as is contended, he could have made payment of the cheque amount within

the prescribed period after receiving notice of the complaint. As has been explained by Hon'ble Supreme Court, the Clause (c) of the proviso to Section 138 of the NI Act is meant for honest buyers, whose cheques may have been dishonoured for the fault of others or who may have genuinely wanted to fulfil their promise, but failed to make necessary arrangements for payment of the cheque.

25. The proviso is not meant to protect unscrupulous drawers, who never intended to honour the cheque issued by them it being a part of their modus operandi to cheat unsuspected persons. Same appear to be the position in this case because after recording the conviction by the trial Court and affirming of the same by the Sessions Court, when petitioner realized that in case of dismissal of the petition, he will have to carry out the sentence, he offered to compound the offence with the respondent-complainant and offered to pay an amount of ₹7 lakh, but when the complainant-respondent did not agree to this proposal by pointing out that even if the interest @ 6% per annum is taken right from the year of issuance of the cheque in 2003, the amount will exceed ₹11 lakh, the petitioner refused to pay the amount. So much so the offer of the complainant-respondent to settle the amount for ₹8 lakh was also not accepted by the petitioner. This in itself shows the unscrupulous nature of the petitioner, who does not want to honour the commitment for paying the cheque amount and the interest thereon as has accrued till this date.

26. The last contention of Id. counsel that return memo issued by the bank does not bear its stamp and so, it could not have been taken into consideration, has also no force. Section 146 of the NI Act pleads as under: -

“146. Bank's slip prima facie evidence of certain facts:-

The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.”

27. Perusal of aforesaid statutory provision would reveal that there has to be a memo, on which there has to be an official mark. Term "*official mark*" has not been defined under the Negotiable Instrument Act. This provision was inserted by the Act 55 of 2002 w.e.f. 06.02.2003 with the purpose to relieve the bank official from the burden of giving statement, as witnesses to prove such bank slip or memo. Considering the flood of cases filed under Section 138 of the Negotiable Instrument Act, the legislature inserted this statutory presumption for the benefit of holder of a cheque in the event of dishonor of cheque.

28. Further, in ***Guneet Bhasin vs State of NCT of Delhi***, CRL.M.C. 4100/2022 & CRL.M.A. 16919/2022, decided on 14th November, 2022, it has been observed by Delhi High Court as under:

9. The cheque return memo is a memo informing the payee's banker and the payee about the dishonour of a cheque. When the cheque is dishonoured, the drawee bank immediately issues a cheque return memo to the payee's banker mentioning the reason for non-payment. The purpose of the cheque return memo is to give the information of the holder of the cheque that his cheque on presentation could not be encashed due to the variety of reasons as mentioned in the cheque return memo. As per the section 146 of the NI act, the cheque return memo on presentation presumes the fact of dishonour of the cheque unless and until such fact is disapproved. Neither section 138 nor the section 146 of the NI Act has prescribed any particular form of cheque return memo. The section 138 of the NI Act does not mandate any particular form of cheque return memo, which is nothing but a mere information given by the Banker of the due holder of a cheque that the cheque has been returned as unpaid. If the cheque return memo is not bearing any official stamp of the bank, it does not render the cheque return memo as invalid or illegal. The cheque return memo is not a document which is not required to be covered under section 4 of the Bankers Book (Evidence) Act, 1891. If there is any infirmity in the cheque return memo, it does not render entire trial under section 138 of the NI Act as nullity."

29. It is, thus, clear that on production of the bank slip or memo having thereon the official mark noting that the cheque has been dishonoured, the Court is to presume the fact of dishonour of such cheque, unless and until such fact is disproved. The mention of the word ‘official mark’ does not mean that there should be stamp of the bank concerned.

30. In the present case, the return memo reveals that signature of the issuing official of the bank as well as name of the branch of the bank are duly mentioned on the said return memo. It is very clear on perusal of the return memo that it has been issued by Punjab National Bank, the banker of the petitioner-accused. Petitioner has not claimed that the said return memo was not issued by his banker. As such, the contention is devoid of any merit.

31. No other point was urged.

32. Consequent to the aforesaid discussion, it is held that there is absolutely no illegality or perversity in the judgments as passed by the trial Court and affirmed by the First Appellate Court. Consequently, the present petition is hereby dismissed. The copy of the said judgment be sent to the Id. trial Court concerned for issuing necessary warrants to take the petitioner in custody so as to carry out the sentence as imposed by the trial Court concerned and as affirmed by the Appellate Court.

Dismissed.

27.03.2025

Vivek

(DEEPAK GUPTA)
JUDGE

1. Whether speaking/reasoned?
2. Whether reportable?

Yes
Yes