255 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-1357-2023 (O & M)
Date of decision: 13.02.2025

MANOJ YADAV

...PETITIONER

V/S

SAROJ DEVI

...RESPONDENT

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Amit Jain, Advocate for the petitioner.

Mr. Vishal Sharma, Advocate for the respondent.

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HARPREET SINGH BRAR, J. (ORAL)

1. The present revision petition has been preferred against judgment dated 17.04.2023 passed by learned Additional Sessions Judge, Gurugram, whereby the judgment of conviction dated 03.08.2019 as well as the order of sentence dated 05.08.2019 passed by learned Judicial Magistrate Ist Class, Gurugram, were upheld, in the case stemming from criminal complaint No.628 dated 17.05.2017 under Section 138 of the Negotiable Instruments Act, 1881(hereinafter 'NI Act').

2. Briefly, the facts, as alleged, are that the petitioner-accused was well known to the respondent and had friendly relations with his son. The petitioner had borrowed a sum of ₹10,00,000/- from the respondent as a loan for his personal needs. He had also assured the respondent that the loan would be repaid within two months. Subsequently, after repeated requests, the petitioner issued cheque bearing No.000040 dated 25.03.2017 for a sum of ₹10,00,000/- in order to discharge his legal liability. However, on presentation of encashment, the said cheque was dishonored vide memo dated

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30.03.2017 with remarks "Account Closed". Thereafter, a legal notice dated 19.04.2017 was served on the petitioner. He failed to deposit the required amount in the stipulated time, which caused the respondent to file the complaint *(supra)*.

3. After assessing all the material available on the record, the learned trial Court convicted the petitioner and sentenced him to rigorous imprisonment of one year. The respondent was also awarded a compensation of ₹12,00,000/-. Aggrieved by the same, the petitioner preferred an appeal before the learned lower Appellate Court, which was dismissed vide judgment dated 17.04.2023.

4. Learned counsel for the petitioner *inter alia* contends that in compliance of the order passed by this Court on 26.05.2023, a demand draft for ₹3,60,000/- has been handed over to learned counsel for the respondent and copy of the demand draft has also been presented and retained on the file as 'Mark-Y'. A perusal of the record indicates that no specific demand reflecting the exact amount due, has been made in the notice dated 19.04.2017 (Ex. CW1/E colly) issued to the petitioner. Given the notice itself was faulty and omnibus, the petitioner ought not to have been convicted under Section 138 of NI Act. He further contends that the complaint (*supra*) has been filed by the respondent through Special Power of Attorney held by her son Neeraj Kumar. Moreover, the complaint (*supra*), which is taken on record as 'Mark-X', does not bear any mention with respect to Neeraj Kumar being privy to the disputed transaction between the petitioner and the respondent. Reliance in this regard has been placed on the judgments of the Hon'ble Supreme Court in ***M/s. Rahul Builders vs. M/s. Arihant Fertilizers & Chemical 2008 (1) SCC Civil 553, Vijay Gopala Lohar vs. Pandurang Ramchandra Ghorpade (2020)***

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14 SCC 806 and ***Suman Sethi vs. Ajay K. Churiwal 2000 (2) SCC 380.***

5. *Per contra*, learned counsel for the respondent submits that the petitioner failed to repay the said loan amount, in spite of several calls and personal visits. As such, the petitioner has been rightly convicted by the learned trial Court. In fact, the guilt of the petitioner has been confirmed by two Courts as his appeal against the judgment of conviction was also dismissed by the learned Lower Appellate Court vide judgment dated 17.04.2023.

6. Having heard learned counsel for parties and after perusing the record with their able assistance, it transpires that the compliant (*supra*) has been moved by the respondent-complainant through Neeraj Kumar, her son by executing a Special Power of Attorney in his favour. However, in the complaint *(supra),* nowhere has it been recorded about the Neeraj Kumar being privy to the transaction between the petitioner and the respondent. A three Judge Bench of Hon'ble Supreme Court in ***A.C. Narayanan vs. State of Maharashtra (2014) 11 SCC 790***, speaking through CJI P. Sathasivam, has made the following observations:

> *"26. While holding that there is no serious conflict between the decisions in MMTC (supra) and Janki Vashdeo Bhojwani (supra), we clarify the position and answer the questions in the following manner :*
>
> > *(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.*
> >
> > *(ii)* ***<u>The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.</u>***

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(iii) ***<u>It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.</u>***

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."(emphasis added)

7. Furthermore, the notice itself is defective in nature as it does not clarify what was the amount owed by the petitioner. Relevant parts from the notice are reproduced as under:

"Therefore, under these circumstances, we do hereby call upon you, the above named addressee to ***<u>make the payment of ₹ 10,00,000/- (Ten Lakh Only) being the principle amount of the aforesaid cheque and the entire outstanding amount due to our client along with interest at the rate of 24% P.A. till the time of actual payment, within a period of 15 days</u>*** *from the date of receipt of this notice, and you are further also liable to bear the expenses of ₹25,000/- (Twenty Five Thousand) towards the cost of this legal notice and mental agony and harassment suffered by*

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our client, failing which, we shall constrain to take appropriate legal action in accordance with law, including filing the criminal complaint under Section 138 of the Negotiable Instruments Act, 1881, before the court of competent jurisdiction, entirely at your own cost and responsibility." (emphasis added)

8. It is trite law that serving a notice is a *sine qua non* for instituting a complaint under Section 138 NI Act. The intention behind the said requirement is to give him an opportunity to settle the debt before criminal proceedings are initiated against him. As such, it becomes all the more important to ensure that such a notice contains all necessary details pertain to the cause of action, in unmistakeable terms. While Section 138(b) NI Act does not specify the ingredients of a valid notice, this Court cannot overlook the fact that the notice makes no demand for a specific amount, as such, the petitioner cannot be held liable for failing to make the requisite payment. It is essential for a legal demand notice to clearly indicate the existence and extent of the liability. A two Judge Bench of the Hon'ble Supreme Court in ***Suman Sethi vs. Ajay K. Churiwal (supra,)*** speaking through Justice S.N. Phukan, has opined as follows:

"9. In Section 138 legislature clearly stated that for the dishonoured cheque the drawer shall be liable for conviction if the demand is not made within 15 days of the receipt of notice but this is without prejudice to any other provision of the Act. If the cheque amount is paid within the above period or before the complaint is filed the legal liability under Section 138 will cease and for recovery of other demands as compensation, costs, interest etc., a civil proceeding will lie. Therefore, if in a notice any other sum is indicated in addition to the "said amount" the notice cannot be faulted, as stated above.

10. Drawing our attention to Section 139 of the Act, Dr. Dhawan has

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urged that in the notice in addition to "said amount" other demands are made the presumption as contemplated under Section 138 would operate. We are unable to accept the submission of the learned senior counsel as Section 139 has to be read with Section 138 and reading both the Sections together it would appear that presumption would arise only in respect of the "said amount." We extract below the relevant portion of notice :

> *"I, therefore, by means of this notice call upon you to pay the amount of Rs. 20,00,000/- along with the incidental charges of Rs. 1,500/- spent on the cheque on its presentation and also Rs. 340/- as notice charges within a period of 15 days from the date of receipt thereof, failing which my clients shall take necessary legal steps against you holding you liable for all costs and consequences thereof which please note."*

11. ***In the notice in question the "said amount" i.e. the cheque amount has been clearly stated. Respondent No. 1 had claimed in addition to the cheque amount, incidental charges and notice charge. These two amounts are severable. In the notice it was clearly stated that on failure to comply with the demand necessary legal steps will be taken up. If respondent No. 1 had paid the cheque amount he would have been absolved from the criminal liability under Section 138. Regarding other claims, a civil suit would be necessary.*** *"* (emphasis added)

9. In view of the conspicuous absence of specific averments concerning Neeraj Kumar witnessing the transaction or his specific knowledge qua the same as well as the defective notice issued by the respondent, this Court does not find that the guilt of the petitioner has been adequately proved. Accordingly, the present petition is allowed and judgment dated 17.04.2023 passed by the learned Additional Sessions Judge, Gurugram as well as the judgment of conviction dated 03.08.2019 and order of sentence dated

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05.08.2019 passed by the learned Judicial Magistrate Ist Class, Gurugram, are hereby set aside. Consequently, the petitioner is acquitted from the notice of accusation issued against him and his bail/ surety bonds stand discharged. The 20% amount deposited by the petitioner with the learned lower Appellate Court as well as the demand draft, worth 30% of the outstanding amount, is also directed to be released to the petitioner.

10. Pending miscellaneous application(s), if any, also stand(s) disposed of.

(HARPREET SINGH BRAR)
JUDGE

February 13, 2025
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(i)	Whether speaking/reasoned	Yes/No
(ii)	Whether reportable	Yes/No

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