AFR

Court No. - 68

Case :- APPLICATION U/S 482 No. - 42663 of 2022
Applicant :- Shiv Kumar Sharma
Opposite Party :- State of U.P. and Another
Counsel for Applicant :- Omar Zamin,Rohit Nandan Pandey
Counsel for Opposite Party :- G.A.

Hon'ble Mrs. Manju Rani Chauhan,J.

1. By means of instant application the applicant has approached this Court challenging the proceedings of Complaint Case No. 2233 of 2021[1], under Section 138 of the Negotiable Instruments Act, 1881[2], Police Station Phase-2, District Gautam Buddh Nagar and summoning order dated 05.04.2022 passed by Additional Chief Judicial Magistrate-III, Gautam Buddh Nagar.

2. Brief facts of the case are; a complaint under Section 138 of the N.I. Act was filed against the applicant with the allegation that the applicant having good relations with opposite party no. 2 demanded an amount of Rs. 1,25,00,000/- requesting him to become a partner in his business, which was being run by him since 2013. The opposite party no. 2, on the assurance of the applicant, gave an amount of Rs. 1,25,00,000/-. It has further been alleged that the applicant, having the intention of cheating, showed profit in the Firm for the year 2014-15 and returned an amount of Rs. 8,00,000/- to the opposite party no. 2. On being asked to return the balance amount, the applicant gave Cheque No. 097414 dated 24.03.2021 of Rs. 20,00,000/-. The said cheque was presented by the complainant in the Bank on 05.04.2021 which was returned with the remark “Bank Blocked”. Thereafter, the opposite party no. 2 approached the applicant informing him about return of the cheque by the Bank with the aforesaid remark and requested him to pay the amount as was taken by him, on which the applicant misbehaved with the opposite party no. 2 and used abusive

1 Satpal Naagar v. Shiv Kumar Sharma
2 the N.I. Act

language, threatening for dire consequences and abruptly refused to return the amount. Thus, a legal notice dated 17.04.2021 was given by the opposite party no. 2 through registered post, however, the same was alleged to be not accepted by the applicant. The applicant did not return the amount nor submitted reply to the legal notice given by opposite party no. 2, therefore, the present complaint was filed on 27.07.2021. Subsequently, the learned Magistrate, after recording statements under Section 202 Cr.P.C. summoned the applicant vide order dated 05.04.2022 under Section 138 of the N.I. Act.

3. On earlier occasion i.e. 15.02.2023 Sri Omar Zamin, learned Advocate argued the matter at length, however, to respond some specific queries, the case was posted for 21.03.2023 for further hearing, though this Court had expressed its view of not being convinced to grant any relief in favour of the applicant. To utter surprise, on the next date, Sri Rohit Nandan Pandey, learned Advocate stepped in by filing his memo of appearance on behalf of the applicant, whereas he was not in a position to assist the Court even to a tad bit as he appeared to be in oblivion state regarding the facts of the case as also incognizant of the exhaustive and strenuous arguments advanced by Mr. Omar on the previous date. On being insisted to render assistance, Mr. Pandey summed up his arguments in very cavalier and unvirtuous manner. Such practice not only impedes early conclusion of a case but also disparages the profession and is execrated as infelicitous.

4. Appearance of a subsequent counsel at the concluding stage of arguments, that too, after disclosure of the view by the Court towards its result, emanates an undesired situation inimical to highly dignified profession of Advocacy regarded by all stratums of society. An advocate is considered as an Officer of the Court, thus, he or she is expected to adhere to the canon and criterion of etiquettes towards professionalism. Advocate is expected to perform his functions amenable to honored and dignified profession as also he or she is duty bound to maintain decorum

of the court discharging his or her functions properly not only with colleagues but even with his opponents.

5. Conduct of accepting the brief by a subsequent counsel at the stage of conclusion of arguments by previous counsel and that too before the very date of pronouncement of the judgement, permeates unsolicited impression and does not fetch appreciation rather it spots a stigmatic mole over the person who being a lawyer is believed to follow the traditional decorum in the field of legal profession. Mr. Pandey who carries respectful position for his professional etiquettes is advised to refrain himself from being introduced as a subsequent engagement in a case where arguments have already been concluded by some other previous counsel, so as to secure faith and regard to his credit. The Court always commends the fairness and never thinks of subverting or demolition of professional principles and ethics at the end of a lawyer. In case of ineluctable request of the client, nevertheless Sri Pandey should have been conversant with the status of arguments advanced by Mr. Omar Zamin before accepting the brief.

6. Emergence of present incident constrains me to request the luminaries of the Bar Council as well as Bar Association, namely, (i) Chairman, Bar Council of Uttar Pradesh, Allahabad; (ii) President, High Court Bar Association, Allahabad and (iii) Secretary, High Court Bar Association, Allahabad to assign space for consideration of such inappropriate situations, in a joint meeting which may cast a stone to the frequently rising wretched conditions affecting the noble profession of Advocacy, which resultantly becomes one of the reasons for delayed justice and jolts the faith of a litigant over the system.

Arguments advanced by Sri Omar Zamin, earlier learned Counsel appeared for the applicant

7. Earlier learned counsel for the applicant Mr. Omar Zamin had argued that the applicant lodged a first information report dated 04.09.2017, wherein he complained about an incident that his bag was

stolen from his car wherein signed and unsigned documents were placed. It appears that the aforesaid cheque came in the hands of opposite party no. 2, after using which the present complaint has been filed hence the complaint against the applicant is not maintainable on this ground.

8. Learned counsel for the applicant next submitted that as per Section 138 of the N.I. Act, the cheque issued, should be drawn by a person "for discharge, in whole or in part, of any debt or other liability" that is to say, the cheque should have been drawn for the discharge of any debt or other liability of a drawer towards the payee. In the present case, it cannot be presumed in any way that the cheque has been issued for a debt or liability. He further submits that the cheque drawn by a person should be from an account maintained by him with a banker for payment of any amount of money to another person out of that account for discharge of his debt or liability. In the present case, the applicant had already lodged a first information report dated 04.09.2017 alleging therein about an incident where his bag containing signed and unsigned documents along with other cheques, was lost. It appears that the aforesaid cheque came in the hands of opposite party no. 2, after using which the present complaint has been filed hence the complaint is not maintainable on this ground itself.

9. The learned counsel had further contended that financial irregularities by office bearers is of Mahamedha Urban Cooperative Bank Ltd.[3] as well as regarding misappropriation of money, a first information report was lodged, which led to cancellation of licence of the aforesaid Bank and hence the accounts there were blocked in the year 2017 itself. Thus, the accounts from which the cheque was issued was not in operation and was not being maintained by the applicant, thus, the complaint under Section 138 of the N.I. Act could not be lodged in such a case where a cheque for payment of liability or debt is being issued from the account which is not being maintained at the relevant point of time.

3 The Bank

Relying on a judgement of Punjab and Haryana High Court in the case of **Rajesh Meena v. State of Haryana and others**[4], learned counsel for the applicant submitted that on the date when the cheque was dishonored, the account holder was not maintaining the said account, therefore, in the absence of this material condition it cannot be said that the offence punishable under Section 138 of the N.I. Act is made out as is one of the necessary ingredients required for lodging of complaint under the relevant Act.

10. Learned counsel for the applicant further relied upon a judgement of Delhi High Court in the case of **M/s Ceasefire Industries Ltd. v. State & Ors.**[5]. He submitted that as the accounts had been frozen in terms of the first information report lodged against the Bank and accordingly the licence has been cancelled, therefore, the accounts had been blocked and the Bank which returned the cheques unpaid had done the same by making a remark of 'Bank Block', thus, the reason for return of cheque unpaid being in contravention with the provisions of Section 138 of the N.I. Act, the complaint thus is not maintainable.

Arguments of State

11. Per contra, Mr. K.P. Pathak, learned AGA for the State, has submitted that the summoning order passed by the concerned Magistrate is legal and just in the eyes of the law and at this stage, only a prima facie case is to be seen and the complaint cannot be thrown at the threshold. He further submits that lodging of FIR with regard to missing of bag containing signed and unsigned documents including cheques, the check issued is not mentioned in FIR, therefore, the arguments as placed by learned counsel for the applicant cannot be accepted. Regarding other submissions of maintainability of complaint, it is clear that it was well known to the applicant that the Bank account was blocked in the year 2017 itself and he issued the cheque on 24.03.2021 having knowledge that the account was not being maintained by the applicant, thus he cannot

4 CRM-M-14537-2018, dated 01st July, 2019
5 Crl.L.P. 51/2017, decided on 01st May, 2017

turn around and take a stand that the reasons for return of cheque 'unpaid' is not in consonance with the provisions of Section 138 of the N.I. Act, for the complaint to be maintainable.

12. I have heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

13. It is apposite to quote the provisions of Section 138 of the Act, which read as under:

> "**138. Dishonor of cheque for insufficiency, etc., of funds in the accounts**:- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:
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> PROVIDED that nothing contained in this section shall apply unless-
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> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.
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> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and
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> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
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> Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

14. Section 138 deals with a cheque drawn by a person "for the discharge, in whole or in part, of any debt or other liability." The section does not say that the cheque should have been drawn for the discharge of any debt or other liability of the drawer towards the payee. Thus in complaint under Section 138 of N.I. Act, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability, is on the accused. The applicant being holder of cheque and the signature appended on the cheque having not been denied by the Bank, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before this Court refers to various judgments of the Apex Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn.

15. A Three Judges' Bench of the Hon'ble Apex Court in the case of **C.C. Alavi Haji v. Palapetty Muhammed and Another**[6] has held 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[7]; State of M.P. v.

6 (2007) 6 SCC 555
7 (1992) 1 SCC 647 : AIR 1992 SC 1604

> Hiralal[8], and V. Raja Kumari v. P. Subbarama Naidu[9]. 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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> 17. 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 a 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 case[10], if the "giving of notice" in the context of Clause (b) of the proviso 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."

16. It is not necessary to 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, the 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. In the case of **Ajeet Seeds Ltd. vs. K. Gopala Krishnaiah**[11], the Apex Court has held that absence of averments in the complaint about service of notice upon the accused is

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8 (1996) 7 SCC 523
9 (2004) 8 SCC 774 : 2005 SCC (Cri) 393
10 (1999) 7 SCC 510 : 1999 SCC (Cri) 1284
11 (2014) 12 SCC 685

the matter of evidence. The paragraph nos. 10 and 11 of the said judgement are reproduced herein below:-

> "10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to 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.
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> 11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in C.C. Alavi Haji[12], this Court did not deviate from the view taken in Vinod Shivappa[13], but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from Vinod Shivappa where this Court has held that service of notice is a matter of evidence and proof and it would be premature at the stage of issuance of process to move the High Court for quashing of the proceeding under Section 482 of the Cr.P.C. These observations are squarely attracted to the present case. The High Court's reliance on an order passed by a two-Judge Bench in Shakti Travel & Tours is misplaced. The order in Shakti Travel & Tours does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in C.C. Alavi Haji, to which we have made a reference, the three-Judge Bench has conclusively decided the issue. In our opinion, the judgment of the two-Judge Bench in Shakti Travel & Tours does not hold the field any more."

17. Further the Apex Court in the matter of **Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal**[14], had considered Section 118(a) of the Act and held that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it

12 C.C. Alavi Haji v. Palapetty Muhammed, (2007) 6 SCC 555 : (2007) 3 SCC (Cri) 236
13 D. Vinod Shivappa v. Nanda Belliappa, (2006) 6 SCC 456 : (2006) 3 SCC (Cri) 114
14 (1999) 3 SCC 35

is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No.12 following has been laid down:-

> "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non- existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

18. In its recent judgment, the Apex Court in the matter of **Basalingappa v. Mudibasappa**[15] specifically in paragraph nos. 23 and 24 has noticed as follows:-

> "23. We may now notice the judgement relied on by the learned counsel for the complainant i.e. judgment of this Court in *Kishan Rao v. Shankargouda*[16]. This Court in the above case has

15 (2019) 5 SCC 418
16 (2018) 8 SCC 165 : (2018) 4 SCC (Civ) 37 : (2018) 3 SCC (Cri) 544

examined Section 139 of the Act. In the above case, the only defence which was taken by the accused was that cheque was stolen by the appellant. The said defence was rejected by the trial court. In paras 21 to 23, the following was laid down: (SCC pp. 173-74)

> 21. ….
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> 22. ….
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> > 27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof."
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> 23. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High Court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW 1, himself has not been explained by the High Court.
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> 24. The above Kishan Rao[17] case was a case where this Court did not find the defence raised by the accused probable. The only defence raised was that cheque was stolen having been rejected by the trial court and no contrary opinion having been expressed by the High Court, this Court reversed the judgment of the High Court restoring the conviction. The respondent cannot take any benefit of the said judgment, which was on its own facts."
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> *(Emphasis added)*

19. The matter regarding stolen cheque has been elaborately dealt with by this Court in the case of **Ranjit v. State of U.P. and another**[18], wherein the plea taken on behalf of the applicant regarding non-

17 Kishan Rao v. Shankargouda, (2018) 8 SCC 165 : (2018) 4 SCC (Civ) 37 : (2018) 3 SCC (Cri) 544
18 (2020)03-05ILR A1752 : Application U/s 482 No. 47282 of 2019, Order dated 31.01.2020.

maintainability of the complaint on the ground of stolen of cheques has been rejected. As regards the judgements placed on by learned counsel for the applicant are not applicable in the facts of the present case as the applicant was well aware of the fact that he is issuing a cheque towards payments of debt or liability from an account, which is blocked, of which the complainant was not aware.

20. In view of the settled legal position, as noticed above, it is clear that at this stage, only a prima facie case is to be seen and the complaint cannot be thrown at the threshold and the factum of disputed service of notice requires adjudication on the basis of evidence and the same can only be done and appreciated by the trial court.

21. All the submissions made by learned counsel for the applicant are disputed questions of fact. Therefore, when the facts have to be established by way of evidence, this Court while exercising the powers under section 482 of Cr.P.C., cannot interfere with such proceedings. Hence, no grounds are made out for quashing of the proceedings under section 138 of the Negotiable Instruments Act.

22. On the basis of discussions made herein above, this Court finds that there is no illegality or infirmity in the summoning order dated 05.04.2022 passed by the concerned court below. Therefore, no interference is required at this stage.

23. In view of the aforesaid, the application is, accordingly, dismissed.

24. The Registrar General of this Court shall communicate this order to the Chairman, Bar Council of Uttar Prdesh, Allahabad; President, High Court Bar Association, Allahabad and Secretary, High Court Bar Association, Allahabad, apprising them of the suggestions expressed in paragraph nos. 3 to 6 of this order.

Order Date :- 29.3.2023
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