

2012 (0) AIJEL-HC 232191

GUJARAT HIGH COURT

Hon'ble Judges:Bankim N.Mehta, J.

Bankimchandra Ravjibhai Patel Versus Chinubhai Bachubhai Chauhan

Criminal Appeal No. 1294 of 2010 ; \*J.Date :- FEBRUARY 13, 2012

- NEGOTIABLE INSTRUMENTS ACT, 1881 Section - 138 , 139

**Negotiable Instruments Act, 1881 - S. 138, 139 - dishonour of cheque - Trial Court acquitted accused - appeal against acquittal - held, two cheques were obtained by the complainant as security against the amount advanced to the accused - out of amount advanced to the accused, part of the amount was given by the father of the complainant - cross-examination of complainant and documentary evidence of notice correspondence clearly indicate that there was dispute of account between the parties and blank cheques from the accused were obtained as security - u/S. 139 of the Act, it shall be presumed that holder of a cheque received the cheque amount in discharge of any debt or liability, unless the contrary is proved - presumption is rebuttable presumption - when accused has to rebut presumption, standard of proof for doing so is that of preponderance of probabilities - therefore, if accused is able to raise a probable defence which creates doubts about existence of a legally recoverable debt or liability, the prosecution can fail - therefore, when accused is able to rebut presumption and raise probable defence, burden shifts on complainant to prove that cheque in question was given towards discharge of legally recoverable debt or liability - out of the amount advanced to the accused, some of the amount was advanced by father of the complainant - in order to come out from legal hurdle, complainant has tried to explain that though the cheques were drawn by his father, the amount was given from the joint account with the complainant - this explanation does not bring the prosecution case u/S. 138 of the Act - in order to establish the offence it is required to be proved that the cheque was given towards discharge of legally recoverable debt or liability - complainant admitted that part of the amount was given by his father, complainant was not entitled to recover such amount from the accused and as the cheque included such amount, cheque was not given towards legally recoverable debt or liability - complainant gave notice in respect of return of both the cheques and made demand of the amount thereof - notice making demand of unpaid cheques was not legal - therefore also requirement of S. 138 of the Act are not fulfilled - complainant failed to prove that there was existence of legally recoverable debt or liability and cheque in question was given by the accused towards discharge of such legally recoverable debt**

**or liability and that notice served to the accused was legal as required u/S. 138(b) of the Act - impugned judgment held, proper - appeal dismissed.**

**Imp.Para:** [ 9 ][ 10 ][ 11 ]

**Equivalent Citation(s):**

2012 (2) DCR 26 : 2012 (2) NIJ(SN) 624

## **JUDGMENT :-**

**1** The appellant-original complainant has preferred this appeal under Section 378 of the Negotiable Instruments Act challenging the judgement and order of acquittal passed by learned Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Nadiad on 22.02.2010 in Criminal Case No. 1156 of 2008 acquitting the respondents accused for the offence under Section 138 of the Negotiable Instruments Act (for short the 'Act').

**2** According to the complainant, the accused is doing business of lining works of Automobiles in the name of Alpesh Lining Works. As the accused was in need of finance for his business before about two and half years, he demanded Rs. 4 lacs. Therefore, he gave Rs. 4 lacs to the accused as hand loan. At the time of giving the amount, the accused gave two cheques bearing number 782556 and 782558 dated 17.08.2007 each for Rs. 2 lacs drawn on Bank of Baroda, Ashram Road Branch, Nadiad as security. On making demand of the amount, the accused returned, in all Rs. 2 lacs, by cheques. Therefore, Rs. 2 lacs remained payable by the accused. The cheques given by the accused towards security were presented in the bank but, both the cheques returned unpaid with endorsement of "insufficient fund". Therefore, a notice dated 29.08.2007 was served to the accused through advocate and a demand for unpaid cheque amount was made. The accused gave reply on 10.09.2007 through his advocate. Therefore, he again sent reply to the reply of notice thorough advocate on 22.09.2007 and demanded outstanding amount of Rs. 2 lacs but, the accused did not pay the amount. Therefore, the complaint under Section 138 of the Act was filed in the Court of learned Chief Judicial Magistrate at Nadiad. The complaint was registered as Inquiry No. 133 of 2007. The complainant filed affidavit Ex. 5 that he does not want to proceed with the complaint in respect of cheque No. 782556. Therefore, after examination of the complainant, by order dated 15.02.2008, the Trial Court registered the offence as Criminal Case No. 1156 of 2008 in respect of cheque number 0782558 and issued summons to the accused and dismissed the complaint in respect of cheque number 0782556.

**3** Pursuant to the summons issued by the trial court, the accused appeared and pleaded not guilty. Therefore, the prosecution adduced evidence on completion of recording of evidence; the incriminating circumstances appearing in the evidence against the accused were explained to him. The accused, in his further statement, recorded under Section 313 of Criminal Procedure Code, 1973 explained the incriminating circumstances and stated that according to him, Rs. 30,000/- remains payable to the complainant and Rs. 60,000/- remains payable by the complainant and the complainant has encashed the cheque for Rs. 90,000/- against the amount payable to him. The accused also filed return statement and explained that out of the amount given to him by

cheque no. 848853 for Rs. 1 lac and cheque No. 538269 for Rs. 50,000/- were drawn by Mr. R.J.Patel but Mr. R.J. Patel has not given any notice to him nor filed complaint, that the complainant has not served notice as power of attorney holder of the said Mr. R.J.Patel. Therefore, no offence is committed under Section 138 of the Act. After hearing learned advocate for the parties, the trial court by impugned judgement, acquitted the accused. Being aggrieved by the said decision, the complainant has preferred this appeal.

**4** I have heard learned advocate Mr. K.R.Brahmbhatt for the appellant and learned advocate, Mr. Aftab Hussain Ansari for respondent-accused and learned APP, Mr. R.C.Kodekar for respondent-State at length and in great detail. I have also perused the record and proceedings of the trial court.

**5** Learned advocate, Mr. Brahmbhatt submitted that the amounts were given to the accused by the complainant and some of the amounts were given from the joint account with his father Mr. R.J.Patel. Therefore, legal debt is proved. He also submitted that the cheques were given towards security by the accused and as the accused failed to repay the amount, the cheques were presented in the bank. He further submitted that as the cheques returned unpaid, notice was served and demand of unpaid cheque amount was made but the accused gave evasive reply. He also submitted that after filing of the complaint in respect of two cheques, at the time of examination, the complainant stated that he does not press complaint for one of the cheque, and therefore, the court issued summons for the other cheque. He also submitted that the complainant proved that amounts were given to the accused and the cheque in question was given towards discharge of legal debt. Therefore, the trial court committed error in acquitting the accused. Hence, this appeal is required to be allowed and the impugned judgement is required to be set aside.

**6** Learned advocate, Mr. Ansari submitted that out of the amounts shown in the complaint, two cheques were drawn by father of the complainant. Therefore, it cannot be said that the amount of such cheques were given by the complainant and the complaint was not filed by power of attorney holder or did not state that he had authority to file the complaint on behalf of his father. He also submitted that the complainant failed to prove legally recoverable debt or liability. He also submitted that the complainant gave notice demanding outstanding amount of Rs. 4 lacs for two cheques but when the accused in reply to the notice raised a defence that part of the amount is already paid, the complainant changed his stand and restricted his complaint in respect of one cheque only which is not permissible under law. Therefore, the trial court was justified in acquitting the accused and no interference is warranted in the impugned judgement.

**7** According to the complaint, in all, Rs. 4 lacs were advanced to the accused as per the details given in para 2 of the complaint. The details given in the complaint indicate that all the amounts, except the amount of Rs. 20,000/- given on 07.04.2005, were given by cheque. The accused disputed receipt of cash amount and the complainant did not produce any evidence to show that cash amount was received by the accused. It also emerges that according to the complainant, two cheques each of Rs. 2 lacs were given

by the accused towards discharge of liability and on dishonour of cheques unpaid, the complainant served notice as required under Section 138 (b) of the Act to the accused.

**8** Under Section 138(b) of the Act, where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money out of that account is returned by the bank unpaid on account of insufficient funds or that the cheque amount excess in amount arranged to be paid from that account payee or holder in due course of the cheque, as the case may be, is required to make the demand for payment of unpaid cheque amount by giving a notice, in writing, to the drawer of cheque on the receipt of information by him from the bank regarding returning of the cheque as unpaid. The prosecution produced copy of the notice served to the accused at Exh. 18. It is alleged therein that, in all, Rs. 4 lacs were given to the accused and two cheques in question were given towards discharge of such liability but the cheques have returned unpaid on account of insufficient funds. The prosecution produced the reply to the notice given by the accused at Exh. 20. In the reply to the notice, the accused stated that he received Rs. 3,80,000/- from the complainant and out of that cheque no. 538269 for Rs. 50,000/- and cheque No. 848853 for Rs. 1 lac were given by Mr. R.J.Patel. Therefore, deducting the amount, Rs. 2,30,000/- remains payable and out of said Rs. 2,30,000/-, Rs. 2 lacs were returned by two cheques No. 872647 and 782580 each for Rs. 1 lac. Thereby only Rs. 30,000/- remains payable. The accused, in the reply to the notice, also stated that the blank cheques were given towards security and the cheques have been misused. The complainant gave reply to the reply of notice given by the accused at Exh. 22. In the reply, the complainant stated that an amount of Rs. 1,50,000/- was paid to the accused by two cheques from the account of his father and out of the amount of Rs. 4 lacs given to the accused, he received Rs. 2 lacs, and hence, Rs. 2 lacs remains payable by the accused. This notice correspondence clearly indicates that out of the amount given by the complainant Rs. 1,50,000/- were given by father of the complainant to the accused. In order to prove legal debt, the complainant examined himself at Exh. 8. In the cross-examination, the complainant admitted that out of the amount of Rs. 3,80,000/- given by cheques, Rs. 1,50,000/- were given from the joint account with his father and the cheques were given by his father. The complainant also admitted that his father did not give notice to the accused to recover Rs. 1,50,000/- and also deposed that he has no documentary evidence to show that Rs. 20,000/- were paid in cash to the accused. The complainant also admitted that he has confined his complaint in respect of cheque No. 0792558 for Rs. 2 lacs includes the amount given by Mr. R.J.Patel.

**9** In view of above evidence, it clearly emerges that two cheques were obtained by the complainant as security against the amount advanced to the accused. It is also not in dispute that out of the amount advanced to the accused, part of the amount was given by the father of the complainant. The cross-examination of the complainant and the documentary evidence of notice correspondence clearly indicate that there was dispute of account between the parties and blank cheques from the accused were obtained as security. Under Section 139 of the Act, it shall be presumed that holder of a cheque received the cheque amount in discharge of any debt or liability, unless the contrary is proved. The presumption is rebuttable presumption. When an accused has to rebut the presumption, the standard of proof for doing so is that of preponderance of probabilities. Therefore, if the accused is able to raise a probable defence which creates doubts about

existence of a legally recoverable debt or liability, the prosecution can fail. In order to raise probable defence, an accused is not required to enter into witness box or lead evidence but he can rely on materials submitted by the complainant. When an accused is able to rebut the presumption and raise probable defence, the burden shifts on the complainant to prove that the cheque in question was given towards discharge of legally recoverable debt or liability. It is a settled proposition that presumption raised in favour of holder of cheque does not extend to the extent that the cheque was issued for discharge of any debt or liability which is required to be proved by the complainant. In the instant case, it clearly emerges that out of the amount advanced to the accused, some of the amount was advanced by father of the complainant. In order to come out from legal hurdle, complainant has tried to explain that though the cheques were drawn by his father, the amount was given from the joint account with the complainant. In my view, this explanation does not bring the prosecution case under Section 138 of the Act. In order to establish the offence it is required to be proved that the cheque was given towards discharge of legally recoverable debt or liability. In view of the fact that the complainant admitted that part of the amount was given by his father, it cannot be said that the complainant was entitled to recover such amount from the accused and as the cheque included such amount, it cannot be said that the cheque was given towards legally recoverable debt or liability.

**10** It also emerges that the complainant gave notice in respect of return of both the cheques and made demand of the amount thereof. The accused in reply to the notice Exh. 20 raised several disputes including the dispute that Rs. 2 lacs were paid. The complainant admitted the payment in his reply Ex. 22 and reiterated that out of unpaid amount of two cheques each of Rs. 2 lacs only Rs. 2 lacs is payable by the accused. In view of this admission, the notice making demand of unpaid cheques was not legal. Therefore also requirement of Section 138 of the Act are not fulfilled.

**11** In view of above, the complainant failed to prove that there was existence of legally recoverable debt or liability and cheque in question was given by the accused towards discharge of such legally recoverable debt or liability and that notice served to the accused was legal as required under Section 138(b) of the Act. Therefore, the trial court was justified in acquitting the accused. Hence, no interference is warranted in the impugned judgement.

In the result, the appeal fails and stands dismissed.