IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr. A No. 290 of 2006
Judgment reserved on 04.04.2014
Pronounced on: *11th April, 2014.*

Girish Thakur .....*Appellant*

Versus

Abdul Gani ...*Respondent.*

Coram:
The Hon'ble Mr. Justice Mansoor Ahmad Mir, A.C.J.

Whether approved for reporting ?[1] *Yes.*

For the appellant: Mr.Shashi Bhushan, Advocate.

For the respondent: Mr. B. B. Vaid, Advocate.

Mansoor Ahmad Mir, A.C.J.

Complainant, who remained unsuccessful for prosecution, for the offence punishable under the Negotiable Instruments Act, 1881, for short "the Act", has occasioned this appeal against the judgment and order dated 21.12.2005, passed by the Additional Chief Judicial Magistrate, Chopal, District Shimla in a criminal case No. 3-1 of 2005, titled Sh. Girish Thakur versus Abdul Gani, whereby and whereunder, the complaint came to be dismissed, on the grounds taken in the memo of appeal, for short "the impugned judgment".

2. A brief survey of relevant facts, germane for consideration and disposal of this appeal is that the complainant/appellant filed a complaint before the Additional Chief Judicial Magistrate, Chopal, against the

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ?.***

accused/respondent for the commission of an offence punishable under Section 138 of the Act, allegedly on the ground that the accused/respondent had requested the father of the complainant to provide vehicle to him on lease, which was agreed upon and an agreement to that effect was executed on 13.7.2004. The accused is stated to have failed to make the payments, as agreed upon. The vehicle unfortunately, is stated to have met with an accident, and a sum of ₹80,000/- was spent by the complainant on its repair. After settling the accounts, accused had to pay ₹1,70,000/- to the complainant and, according to accused/respondent, he issued cheque bearing No.480016 dated 20.5.2005, for the said amount. When the cheque was presented for encashment before the Bank, the same was stated to have dishonoured and returned with the remarks ***"insufficient funds"***. It is also alleged in the complaint that registered legal notice was issued and served upon the accused/respondent by the complainant on 1. 8. 2005, followed by another dasti notice dated 4.8.2005. Since the accused failed to satisfy the claim, the complainant was constrained to file complaint under the aforesaid provisions of the Act. The said complaint was registered as criminal case as aforesaid in the trial Court. The Trial Magistrate, after taking cognizance of the offence, issued process against the accused/respondent. He put

in appearance and notice of accusation was put to him to which he pleaded not guilty and claimed trial.

3. The complainant, in order to prove his case, including himself, examined as many as four witnesses.

4. Accused was also examined under Section 313 of the Code of Criminal Procedure, in short "Cr.P.C." After the conclusion of the trial, complaint came to be dismissed by the trial Court in terms of the impugned judgment on the ground that complainant has failed to comply with the ingredients, contained in Section 138 of the Act.

5. It is apt to reproduce Section 138 of the Act herein:

> ***"138. Dishonour 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 honour 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 provision of this Act, be punished with imprisonment for* **2***["a term which may extend to two year"], or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless-*
>
> *(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.*

(b) The payee or the holder induce 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, **3***["within thirty days"] of the receipt of information by him from the bank regarding the return of the cheques as unpaid, and*

(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.

Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability]."

6. The complainant, in order to prove his case, has to prove the following ingredients:

(i) The drawer has issued the cheque in discharge of whole or part of the debt or liability;

(ii) The payee or holder of the cheque has presented the cheque before the bank within six months or its specific validity period, which ever is earlier;

(iii) Return of the cheque as unpaid;

(iv) Payee has given notice to the accused demanding payment within thirty days from the date of receipt of the information by him from the bank regarding the return of the cheque as unpaid;

(v) Failure of the drawer to make payment within fifteen days from the date of demand notice;

(vi) The complainant is also required to prove for what kind of amount, the cheque was issued.

7. Similar principles have been laid down by the apex Court in **K. Bhaskaran** *versus* **Sankaran Vaidhyan Balan and another** reported in **(1999) 7 SCC 510**.

8. The trial Court, after examining these aspects, held that the complainant has failed to prove that notice in terms of the mandate of Section 138 of the Act was served upon the accused. It is a question of fact which the Trial Court has examined, scanned and held that complainant failed to prove that notice was served upon the accused. The apex Court in case titled **P. Venugopal *versus* Madan P. Sarathi** reported in **2008 AIR SCW 7702,** held that service of notice upon the drawer is a question of fact and not to be interfered with in appeal, unless it appears to be perverse.

9. I have gone through the judgment passed by the trial Court and the record.

10. The record, at the first blush, does reveal that the complainant has issued notice by registered post, but there is no whisper or proof which manifestly establishes that notice was ever served upon the drawer through registered post. If it was so, what was the need of serving another dasti notice upon the accused? Even otherwise, complainant has failed to prove that dasti notice was served upon the accused. Thus, the complainant does appear to be blowing hot and cold in the same breath.

11. The Trial Court has rightly observed that there is nothing on record to prove that any notice was sent through registered post and there is also no record to show that notice Ext. CW1/E was served dasti upon the accused. Further, the Trial Court has also held that notice, which is stated to have been served upon the accused, bears no date due to which it was difficult to establish from which date, the period prescribed for making demand and payment of the amount is to be counted.

12. More so, the dasti legal notice allegedly served upon the accused, bears no signatures of Advocate, who has drafted and issued the same. The complainant has not spelt out in the complaint or in the notice what kind of liability it was.

13. There is no manner of doubt that presumption under the law is in favour of the holder of the cheque but that presumption does not absolve the complainant from proving the fact that cheque was issued for discharging any debt or legal liability. It is apt to reproduce para 20 of **P. Venugopal's** judgment supra, reported in **2008 AIR SCW 7702**:

> *"20. Indisputably, in view of the decisions of this Court in Krishna Janardhan Bhat (supra), the initial burden was on the complainant. The presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the*

discharge of any debt or liability which is required to be proved by the complainant. In a case of this nature, however, it is essentially a question of fact."

14. I do wish to observe here that the complainant has not disclosed anywhere how the accused had to pay ₹1,70,000/-; whether it was a debt or any other kind of liability.

15. The apex Court in **K.R. Indira *versus* Dr. G. Adinarayana** reported in **AIR 2003 SC 4689**, held that a notice which is not containing specific demand, is invalid.

16. As a corollary to the aforesaid discussion and observations, no interference to upset the judgment of acquittal, passed by the learned trial Court is warranted. The impugned judgment dismissing the complaint, acquitting the accused, passed by the trial Court is therefore, upheld.

17. Accordingly, the appeal stands disposed of. Send down the record, forthwith.

(Mansoor Ahmad Mir)
Acting Chief Justice.

April 11, 2014,
(C.M. Thakur)