Namely, M/S Rahul Builders vs Arihant Fertilizers & Anr. (2008) 1 on 3 October, 2019

IN THE COURT OF MR. GAURAV SHARMA : MM : NI ACT-03
(CENTRAL) : TIS HAZARI COURTS : DELHI.

CC No. 542605/16

DATE OF INSTITUTION : 11.07.2008
DATE RESERVED FOR JUDGMENT : 19.09.2019
DATE OF JUDGMENT : 03.10.2019

IN THE MATTER OF:

M/s Amba Leasing & Finance Co
Through its Authorized Representative/Manager
Sh. Sandeep Malik
5, Basant Lok Complex,
Basant Vihar
Delhi .....Complainant

VERSUS

Sh. G.S.Bhatia
S/o Sh. J.S.Bhatia
R/o 41, Sant Nagar
East of Kailash
Delhi
Also at :
16/19 Third Floor,
Subhash Nagar, Delhi
.....Accused

JUDGMENT:

a) Srl. No. of the case & Date of institution : 1840/1 & 14.07.2008

b) Date of commission of offence : on the 15th day of receiving of legal demand notice

c) Name of the complainant : M/s Amba Leasing & Finance Co Through its AR/Manager Sh. Sandeep Malik

d) Name of the accused persons : Sh. G.S.Bhatia

e) Nature of offence complained of : S. 138 NI Act

f) Plea of the accused person :Accused pleaded not guilty

h) Final Order : Acquitted

i) Date of order : 03.10.2019 COMPLAINT UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT,1881 JUDGMENT 03.10.2019

1. The accused G S Bhatia is hereby Acquitted of the offence u/s 138 of the Negotiable Instruments Act, 1881.

2. The defence put forward by the accused warrants favourable consideration in light of various judicial pronouncements, the relevant provisions of law and evaluation of the evidence on record.

Factual Scenario

3. The factual scenario of the present complaint filed u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "NI Act") is that M/s Amba Leasing and Finance Co., hereinafter referred to as the 'complainant', is a finance company. The said company in the first week of January 2004, on being approached by Mr. G. S. Bhatia, hereinafter referred to as the 'accused', for a cash loan of Rs.75,000/- (Rupees Seventy-Five Thousand) provided the same on 14.03.2004 to him. It was further agreed between the parties that for the loan so provided, Rs.150000/- (Rupees One Lakh Fifty Thousand) shall be returned inclusive of interest after 50 months. For this total amount, the accused issued three cheques of Rs 50,000/- (Rupees Fifty Thousand) each, bearing no.220292, 220293 & 220294, each drawn on Canara Bank, East of Kailash Branch, New Delhi and all dated 15.05.2008, hereinafter referred to as the 'cheques in question'. As per the complainant, a receipt -cum- undertaking / declaration was also executed by the accused for aforesaid amount of Rs.150000/- (Rupees One Lakh Fifty Thousand) repayable to the complainant. When the complainant deposited the cheques in question at his bank, all the cheques were dishonoured for the reason 'funds insufficient' vide cheque return memos dated 23.05.2008 in each case. Despite being informed about the dishonour, the accused did not pay any heed. Ultimately, a legal notice dated 27.05.2008 was sent to the accused but he did not pay the amount due. Considering the same, the complainant submits that the accused has wilfully failed to make payment to it and is liable to be punished for the offence u/s 138 NI Act.

Proceedings Before Court

4. In the present complaint summons were issued against the accused. The accused entered appearance and notice of accusation was framed against him u/s 251 CrPC on 04.12.2010 to which the accused pleaded not guilty and claimed trial.

5. In support of his case the complainant examined himself as CW-1 and proved his affidavit in evidence as Ex.CW1/A; cheques bearing no.220292, 220293 & 220294, each drawn on Canara Bank, East of Kailash Branch, New Delhi all dated 15.05.2008 as Ex.CW1/1, Ex.CW1/2 & Ex.CW1/3; Return Memos Dated 23.05.2008 each as Ex.CW1/D1, Ex.CW1/D2 & Ex.CW1/D3; Legal Notice dated 27.05.2008 as Ex.CW1/E; Original Postal Receipt Ex CW1/F, UPC ExCW1/G, Regd. Letter cover ExCW1/H. The complainant was cross examined at length also and CE was thereafter closed on 22.10.2011.

6. Statement of accused u/s 313 read with section 281 Cr.P.C. was recorded on 01.08.2013, wherein which it was stated by the accused that though the cheques in question were signed by him, but the name and the date columns thereof, were not filled by him and in fact, the said cheques were issued for security purposes. The accused denied of having received the legal demand notice and contended that the present proceedings are false. It was also stated by the accused that the complainant has misused the blank stamped paper given to it during prior commercial dealings for security purposes and that the same has been filed without his consent and knowledge.

7. The accused examined two witnesses in his defence, one Mr. Bobby as DW1 and himself as DW2. Thereafter final arguments were advanced by either side, the accused having furnished written arguments as well, subsequent to which trial proceedings were concluded. The accused has relied upon several judgments, namely, M/s Rahul Builders vs Arihant Fertilizers & Anr. (2008) 1 SCC (Cri.) 703, A. C. Narayanan vs State of Maharashtra & Anr. (2014) 11 SCC 790, Sudhir Kumar Bhalla vs Jagdish Chand (2008) 7 SCC 137, Anil vs Purshottam Prabhakar (2010) Cri. L. J. 1217 (Bom) & Om Shakti SC / ST & Minority Credit Co-op Society Ltd. vs M. Venketesh (2008) (2) Kar L J 486.

8. I have considered the submissions of both the parties, perused the record and gone through the relevant provisions of law.

Findings

9. The constituent elements of an offence u/s 138 NI Act are well laid out, in the section itself as well as through various pronouncements of the superior courts. The Hon'ble Apex Court summed them up in a recent judgment, Himanshu v. B. Shivamurthy, (2019) 3 SCC 797 as below :

> 'The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer

of such a cheque should have failed to make 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. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.' As can be seen above, the law is fairly straightforward to comprehend with regards the ingredients of section 138 NI Act.

10. In the defence raised by the accused, it is admitted that the cheques in question bear his signatures. In such a scenario, a presumption shall be raised under section 139 read with section 118 and section 20 of the NI Act against the accused that the cheques in question were issued in discharge of a valid debt or liability. Analysing all the concerned provisions of law in this regard, the Hon'ble Apex Court in Basalingappa v. Mudibasappa, (2019) 5 SCC 418 : 2019 SCC OnLine SC 491 at page 432 noted at para 25 as follows :

'25. We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner :

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. 25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely 25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden. 25.5. It is not necessary for the accused to come in the witness box to support his defence.'

11. Having noted as aforesaid, it must also be kept in mind that mere denial regarding existence of a debt shall not serve any purpose as far as the accused is concerned, as has been held in Kishan Rao v. Shankargouda, (2018) 8 SCC 165,. Quoting Sharma Carpets case [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513, the Hon'ble Apex Court had held at para 20 therein :

'The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by

him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non- existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.'

12. Putting it succinctly, if the cheque in question is admitted to be drawn by the accused (as in the present case, the signatures thereon are admitted by the accused), presumption u/s.139 r/w section 118 of the NI Act is raised against him and it is thereafter upon the accused, to rebut it by adducing evidence. However, the same can be done either by producing direct evidence or also, by referring to the circumstances of the case at hand. What is required of the accused is that a probable defence of such a nature must be raised that it clouds out the version of the complainant at least. The gaps in the complainant's version must be brought out clearly which are so glaring that they cannot be ignored, so as to shift the burden of proof back on him. If that is done so, onus once again shifts back on the complainant, and from thereon it will be upon him to prove his case beyond reasonable doubt. However, if the accused is unable to rebut the presumptions raised against him in such a manner, the complainant is entitled to the relief claimed.

13. In light of the above, the contentions raised by the accused need to be weighed as against those raised by the complainant under the facts and circumstances of the present case to see if the accused has been able to cast a doubt on the narrative of the complainant on the touchstone of the ratio laid down in Kishan Rao (supra) as noted above.

14. To begin with, certain preliminary submissions of the accused need to be considered before evaluating the evidence on record. The accused at the outset has contended that no legal notice was ever received by him for the present complaint. On perusal of the case file, it is observed that the legal notice was duly sent to the accused by way of regd. post as well as through UPC. In fact, when the accused was confronted in his cross examination with ExCW1/H(colly) and asked as to whether the same bear signature of his daughter Ms. Pawanjyot, he seemed evasive and answered that he did not know. However, immediately thereafter, when the accused was questioned about the address on the said envelop ExCW1/H (colly), he identified the same as his correct address which goes on to show that the accused probably did receive the legal notice. But having said so, the evidence led on this aspect of due service of legal notice Ex CW1/E having been delivered or not does not add to or

> subtract from either side's claim. It is well settled that once the accused receives summons from the court, even in case where he may not have been served properly with the legal notice by the complainant, it is deemed that if he wants to pay, then he can do so within 15 days from such receipt of court summons.

There he can no longer plead non-receipt of legal demand notice. In this regard, it was laid down in C.C. Alavi Haji v. Palapetty Muhammed, (2007) 6 SCC 555 as follows :

> "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 GC 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 [(1999) 7 SCC 510 :
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> 1999 SCC (Cri) 1284] 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."

Considering the above, a detailed discussion is not required on the aspect of proving receipt/non-receipt of legal demand notice in a case like the present one where the accused was denying his liability to pay as once he received summons, he could be said to have had good notice of the present complaint.

15. The accused has also contended that the legal demand notice Ex CW1/E was in fact defective, in as much as it stated, in its very first line, that the accused should not make payment. This is quite a peculiar contention and for its proper consideration, the said line of legal demand notice is reproduced herein, verbatim :

> "Please take notice that under section 138 of the Negotiable Instruments Act, that should you fail to pay the amount of Rs.150000/-(Rupees One Lacs Fifty Thousand Only) within stipulated time....."

(emphasis supplied) The meaning and the construction sought to be attributed to the abovesaid line of the legal demand notice by the accused is wholly misplaced. The word 'should' which has been

used in the said line is just another way of saying, 'if'. In fact, such usage is common and stems from the British format of writing. By no stretch of imagination can it be construed to mean that the complainant was asking the accused to not to pay the amount due by way of the use of the word 'should'. The sum and substance of the entire legal demand notice makes it amply clear also. There is no merit in this argument of the accused.

16. It is also the case of the accused that the complainant has not described the nature of liability in the legal demand notice Ex CW1/E and simply asked for the cheque amount and therefore, the legal demand notice Ex CW1/E is improper. For the same, the accused has relied upon the judgment rendered in M/s Rahul Builders vs Arihant Fertilizers & Anr. (2008) 1 SCC (Cri.) 703. Again, this contention of the accused is to be considered only to be repelled at the very threshold. For a legal notice to be valid and proper, it is required that the same amount must be demanded from an accused therein which is represented by the dishonoured cheques in question in any given case. The demand made should clearly mention the cheque numbers which have been dishonoured and the respective amounts represented by them. In Rahul Builders (supra), the outstanding amount due to the appellant from respondent No. 1 was Rs. 8,72,409/-. Respondent No. 1 issued a cheque of Rs. 1 lakh in favour of the appellant, which, on presentation was dishonoured. A notice was thereafter sent by the appellant to respondent No. 1 informing him about dishonour of the cheque and asking him to remit the amount of Rs. 8,72,409/-. It was noted that the amount which respondent No. 1 was called upon to pay was the outstanding amount of the bills, i.e. Rs. 8,72,409/- and the notice was to respond that demand by offering the entire sum of Rs. 8,72,409/-. It was further noted that there was no demand to pay the sum of Rs. 1 lakh which was the amount of the cheque and what was demanded was the entire sum of Rs. 8,72,409/- and not a part of it. In these circumstances, it was held that there was no demand for payment of the cheque amount. The decision of the High Court holding that the notice was invalid, was upheld by the Hon'ble Supreme Court. The said facts are at variance when compared with those in the present case. In the considered view of this court therefore, there was no infirmity in the legal demand notice Ex CW1/E sent by the complainant which mentioned the cheque amounts with all the details quite clearly.

17. The accused has also placed reliance upon the judgment Sudhir Kumar Bhalla vs Jagdish Chand (2008) 7 SCC 137 to aver that since the present cheques in question were given as security, the present case u/s 138 of NI Act is not maintainable. However, the position in law with regards security cheques being covered u/s 138 NI Act is no longer res-integra and it has been so held in a plethora of judgments that such cheques are also covered u/s 138 of NI Act if the amounts represented thereby pertain to a legally recoverable debt outstanding as on the date of presentment of the said cheques for encashment. The Delhi HC in Suresh Chander Goyal vs. Amit Singhal [Crl. LP. 706/2015 decided on 15.05.2015] has explained the position in law in this regard quite lucidly in the following terms:

> "Thus, in my view, it makes no difference whether, or not, there is an express understanding between the parties that the security may be enforced in the event of failure of the debtor to pay the debt or discharge other liability on the due date. Even if there is no such express agreement, the mere fact that the debtor has given a security in the form of a post-dated cheque or a current cheque with the agreement

> that it is a security for fulfilment of an obligation to be discharged on a future date itself, is sufficient to read into the arrangement, an agreement that in case of failure of the debtor to make payment on the due date, the security cheque may be presented for payment, i.e. for recovery of the due debt. If that were not so, there would be no purpose of obtaining a security cheque from the debtor. A security cheque is issued by the debtor so that the same may be presented for payment. Otherwise, it would not be a security cheque. As observed above, the MOU (Ex.CW-1/4) does not expressly, or even impliedly states that the security cheques are not to be used to recover the instalments, even in case of failure to pay the same by the respondent/ debtor... ...Section 138 of NI Act does not distinguish between a cheque issued by the debtor in discharge of an existing debt or other liability, or a cheque issued as a security cheque on the premise that on the due future date the debt which shall have crystallized by then, shall be paid. So long as there is a debt existing, in respect whereof the cheque in question is issued, in my view, the same would attract Section 138 of NI Act in case of its dishonour."

As can be seen above, security cheques are also covered within the ambit of section 138 NI Act if on the date of their presentment a valid legal debt persists. Similar view has also been expressed in Sampelly Satyanarayana Rao vs Indian Renewable Energy (2016) 10 SCC 458. The judgment sought to be relied upon by the accused in Sudhir Kumar Bhalla (supra) is not comparable. That was a case where material alteration of the cheques in question was involved and the Hon'ble Apex Court had set aside the judgment of conviction passed by the Hon'ble High Court on the ground, inter alia, that the Hon'ble High Court had not "addressed" the legal issue of validity of application of section 138 NI Act on security cheques. No finding was given one way or the other. In such a scenario, this does not give any credence to the proposition of the accused.

18. Having negated the preliminary objections of the accused with regards the form of the present complaint, one may move onto his other submissions which have to be considered to see if any probable defence has been made out or not on his behalf. In this regard, one fundamental issue needs to be dealt with right at the start, which has been raised by the accused from the very beginning. It has been contended that since the complainant is a proprietorship concern, the present complaint case should have been filed either by the proprietor personally/or on behalf of the proprietorship concern and if not that, then through any other person holding a validly executed power of attorney in his favour. And since the present complaint has been filed by the Manager of the complaint without any power of attorney in his favour, the case against the accused is a non-starter. Reliance has been placed upon the judgment of the Hon'ble Apex Court delivered by a 3 Judge Bench in A.C. Narayanan v. State of Maharashtra, (2014) 11 SCC 790 for the same.

19. On perusal of the judgment rendered by the Hon'ble Apex Court in A.C. Narayanan (supra), it is found that the contention of the accused weighs on the correct side of law. In the said judgment, after noting all the precedents and examining other appended aspects, the Hon'ble Court summarised the position of law at para 31 follows :

> "31. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where the payee is a proprietary concern, the complaint can be filed:
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> (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee";
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> (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and
>
> (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor."

(emphasis supplied)

20. Additionally, with regards the question as to who can be a power of attorney holder and under what circumstances can he file a complaint on behalf of his principal, the Hon'ble Court laid down in the same judgment, from para 33.1 to 33.5 as follows :

> "33.1. Filing of complaint petition under Section 138 of the NI Act through power of attorney is perfectly legal and competent.
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> 33.2. 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.
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> 33.3. 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.
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> 33.4. In the light of Section 145 of the NI 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 NI 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 NI Act.
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> 33.5. 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 supplied)

21. Upon a conjoint reading of the above, it is clear that for a proprietorship concern, complaint u/s 138 NI Act can be filed, if not by the proprietor on his own behalf or on behalf of the proprietary concern, then by an attorney holder only. Moreover, such attorney holder should necessarily possess knowledge about the transaction in question or should have witnessed the same. If these requirements remain unfulfilled, the complaint shall not be regarded to be validly filed as per the requirements of law. The logic behind this is plain and simple. A person, who is not well conversant with the transaction in question cannot be expected to depose about the same and thereby, the accused shall be precluded from effectively exercising his right of cross examination as the person concerned, who is not a power of attorney holder, shall not be having the where with all knowledge about the transaction in question. Hence also, the requirement of specific averments with respect to an attorney holder in the complaint.

22. In light of the above, if we look at the present complaint, though it was filed in the name of the proprietorship concern M/s Amba Leasing & Finance Co, but, through its Manager Mr Sandeep Malik, who was not the proprietor. Admittedly, there is no power of attorney in the favour of the Manager Sandeep Malik. Intriguingly, it is mentioned at para 2 of the complaint that a power of attorney is filed with the complaint, but no such document is on record. Instead, an authority letter Ex CW1/A has been filed. The said authorization also, can at most be considered just an enabling letter vide which Mr Sandeep Malik has been authorized to undertake all the legal proceedings and other ancillary activities on behalf of the complaint firm with regards the present complaint only. However, nowhere therein has it been specifically averred that Mr Sandeep Malik has knowledge about the transaction in question or that he has witnessed the same, which is so required in view of the express requirement noted in A.C. Narayanan (supra). In the complaint also, it has not been explicitly mentioned anywhere that Mr Sandeep Malik has the requisite knowledge. Only in the evidence affidavit Ex C1 at para 9 and in the verification clause thereto, it is mentioned in the passing that whatever has been said in the name of the Manager Mr Sandeep Malik, is based upon the records of the case available in the office of the complainant company, which are true and correct as per his knowledge. The same looks like an empty formality. What constructive and real knowledge can be attributed to the Manager Mr Sandeep Malik about the transaction in question was tested during his cross examination, which was instructive on this aspect. As CW1 on 22.10.2011, the Manger Mr Sandeep Malik made several admissions that go on to buttress the argument of the accused that the Manager was not well acquainted with the transaction in question. Firstly, he himself admitted in no uncertain terms that there is no power of attorney in his favour to institute the present complaint and that authority letter Ex CW1/A is not the power of attorney. Secondly, the Manager, though submitted that he had been working in the complainant firm since 15years, however seemed unfamiliar with regards the firm/company being registered or not with the Govt of NCT. He gave two contradicting answers almost successively on this point. Thirdly, with regards the transaction in question, the Manager does say that a cash loan of Rs.75,000/- (Rupees Seventy Five Thousand) was given to the accused at Vasant Vihar office in March 2004 and it was settled that Rs 1,50,000/- (Rupees One Lakh Fifty Thousand) would be repaid back by the accused in 48 months. Also, he goes on to contend that the accused also brought a stamp paper of Rs 10/- (Ex CW1/B) on which an undertaking for the repayment of the aforesaid loan was given and at the

same time the cheques in question were also handed over to the complainant by the accused. In the same breath however, the Manager admits that he was not present at the time of execution of the above-mentioned receipt cum undertaking. Now this is extremely important. This receipt-cum-undertaking Ex CW1/B is the document on which the complainant has sought to rely heavily to fix accountability of the accused. And with regards this only, the Manager states that he was not present when the said undertaking was executed. There seems to be a clear contradiction. At one hand, the Manager means to say that cheques in question and stamp paper were given when the loan in question was given but on the other hand, he says that he was not there when any such undertaking was handed over. This entails that he does not have full knowledge about this material aspect of the transaction, notwithstanding the claim of knowledge made by him in his evidence affidavit. Apart from this, the Manager has also admitted that he does not remember the rate of interest at which the loan was given to the accused. For all such questions, only the proprietor could have been the proper person to depose but he never entered an appearance. Regarding such eventualities only, the requirement for a power of attorney holder was laid down by the Hon'ble Apex Court in A.C. Narayanan (supra). Therefore, the sort of half knowledge that the Manager seems to have with respect to the facts of the case, coupled with the fact that no power of attorney was ever furnished in his name in terms of A.C. Narayanan (supra) does indeed pose a big question mark on the complainant's version as to the maintainability of the case itself. In view of the non-fulfilment of the explicit pre- conditions imposed in A.C. Narayanan (supra) for filing a complaint by any person other than the proprietor, the present complaint is bad in law.

23. This court is also cognizant of the fact that the requirement of furnishing a power of attorney can by itself should not result in rejection of the complainant's case in toto and if it is furnished, albeit later also, one can take it into consideration. But despite the accused pointing it out on occasions more than one, it was never so furnished and even no attempt was made for the same. The law should favour the vigilant and not the indolent.

24. With regards the question of power of attorney, one more proposition arises. Can the authorization letter on record, Ex CW1/A itself be treated as the power of attorney ? Though the Manger has not even tried to make such a contention, but in the interests of justice, can such a presumption be made ? This court does not think so. A power of attorney is a formal document creating new rights in favour of the attorney holder. It's a recognized instrument of law and the same requires stamp duty to be paid on it under the relevant provisions. An authority letter therefore, by itself cannot be considered to be at par with a power of attorney which has legal connotations. Even looked at from this angle therefore, this court is of the view that Mr Sandeep Malik, the Manager was not competent to file the present complaint.

25. Another aspect, though never raised by the complainant, but this court considers it important to dwell upon, is that does the judgment rendered in A.C. Narayanan (supra) apply to the present case at hand since it was instituted much prior to the judgment itself? As in, does the judgment A.C. Narayanan (supra) apply retrospectively or prospectively. On this issue, one may quote the view expressed by the Bombay HC in M/s. Jaimin Jewelery Exports Pvt. Ltd. & Ors. Vs. The State of Maharashtra & Anr 2017 SCC OnLine Bom 1771. It was laid down therein in no uncertain terms that the judgment in A.C. Narayanan (supra) has retrospective application. At para 41 thereof, it was

held as follows :

> "41. In A.C. Narayanan (supra) the Apex Court while interpreting the provisions of section 142(a) and 145 which are procedural in nature and were already existing on the statute book as on the date of filing of the complaint, reiterated that the power of attorney is competent to file a complaint under section 138 of the NI Act and to depose before the Court provided he has knowledge of the transaction in question. The Apex Court has neither laid down a new proposition of law on the subject nor upset the settled position of law. The said decision also does not affect any vested or substantial right of the parties. Hence, there is no merit in the contention of the learned counsel Shri Yashpal Thakur that the principles enunciated in A.C. Narayanan (supra) operate prospectively and not retrospectively."

In view of the above, even the hurdle of prospective application of the judgment in A.C. Narayanan (supra) goes out of the way. The accused has relied upon a Karnataka HC judgment Om Shakti (supra) in this regard also which reinforces the same view.

26. Even after noting the inherent shortcoming in the complainant's case vis-à-vis its improper filing as above, if we advert to the evidence on record, the accused seems to have rebutted the presumptions raised against him u/s 118 and 139 NI Act.

27. In the cross examination of the complainant, pitfalls have been shown to exist by the accused. First of all, it has been claimed by the Manager that the complainant is engaged in the business of financing and is so registered for the same. However, no document has been shown in that regard. The accused is right in pointing it out that for any firm/company to be in such financing business, proper license has to be obtained from the concerned authorities. It is not the case of the complainant that it is not a firm/company which is engaged in business of providing finance. If that is admitted, the accused is right in demanding documentary proof for the same. But nowhere has it been placed on record by the complainant. The judgment relied upon by the accused in Anil vs Purshottam Prabhakar (2010) Cri. L. J. 1217 (Bom) favours him in this regard where it was held that if there is no proper licence in favour of such a person who is into money lending, then it cannot be said the cheque issued by the accused was for a liability enforceable in law. Whilst this certainly casts a shadow on the complainant's case, however it does not go as far as to dislodge it completely since the accused has admitted to taking loans from the complainant for business purposes previously.

28. Further, the Manager also admits in his cross examination that in lieu of giving loans, they used to demand documents such as RC, Permit, Insurance, Fitness & Pollution Certificate, Address Proof etc. Per contra, as per the accused's version, he used to take refinance loan from the complainant from which he used to give loan to the end customer. And when some of these end customers defaulted in repaying their loan, the accused as security gave the present cheques in question and one blank stamp paper (Ex CW1/B) to the complainant. It is quite possible therefore that in these circumstances only, the said stamp paper and the cheques in question came into the possession of the complainant, and not by virtue of any loan advanced to the accused since the Manager Mr

Sandeep Malik admitted to taking such documents as a general business practise, alluded to above. This probablises the defence of the accused one bit more as to how the cheques in question together with the blank stamp paper could have come into the possession of the complainant.

29. With regards receipt - cum - undertaking ExCW1/B, one more important point should be noted. It has been the case of the complainant that the said document was executed by the accused on 14.03.2004 and was also brought by the accused. On a bare glance of the said document, it is observed however, that though the same bears the signatures of the accused at the back side, but it is dated 23.01.2004. It is apparent that the stamp paper is dated prior in time and hence, the reasoning offered by the accused seems plausible that the said receipt - cum - undertaking was in fact handed over to the complainant as blank signed for some previous business transactions.

30. In his defence, the accused examined two witnesses, one Mr Bobby as DW1 and himself as DW2. Accused's version, as stated above, is that he used to avail loans from the complainant to ultimately lend to prospective borrowers for purchase of TSRs. At the time of granting such loans, the complainant used to take signatures from purchasers on loan agreement files which also used to contain blank stamp papers and on several of them, the complainant asked the accused to sign in 2004. When few hirers became defaulters, the complainant asked him to give 2-3 cheques as security. When the complainant put continuous pressure on him for repayment of loans defaulted upon by the end customers, the accused took help from others, including from one Sh Virender, and also sold his immovable property. Ultimately, he repaid around Rs 42 Lakh to the complainant after which the complainant handed over all documents and NOCs pertaining to TSRs to Sh Virender on accused's behalf also. However, the accused maintains that despite such repayment, the complainant misused the cheques in question and his blank signed stamp paper to harass him. In his cross examination also, the accused has by and large, stood by his version and no material contradiction was extracted out by the complainant. In fact, the complainant cross examined the accused thread bare on the point as to from where the money was arranged by him to repay previous loan, to the extent of going into the inane intricacies also i.e. what flat, which portion, out of whose share was sold. Despite that, the accused was successful in answering all such questions in some detail. At times a bit incoherently with regards the specifities involved, but enough to raise a defence in his favour on preponderance of probabilities that repayment was indeed made to the complainant of some previously outstanding loan. In fact, DW1 Mr Bobby also confirmed that he had purchased a property at Sant Nagar from the accused. Strangely, such witness was not cross examined by the complainant at all despite opportunity being given. Had it been wanted; details could have been brought out from the said witness DW2 in as far as transactional information about the sale-purchase of the property concerned, but not so. In such a scenario, the version put forth by the accused of having sold off a property to pay to the complainant was reinforced.

31. The complainant sought to question the accused in his cross examination with respect to the amount of refinance availed also. It is true that exactly identical figures were not quoted by the accused on each occasion when such question was put, however the accused categorically stated that he can produce the list of vehicles financed and explained also that NOCs of the said vehicles could not be produced since the same were already deposited with the concerned transport authority. The complainant never insisted on producing the list of vehicles as claimed by the accused, which again

somewhat put force behind the accused's version. Hence the doubt that was tried to be created with regards the amount of finance obtained from the complainant, failed.

32. In view of discussion above, as prolix as it has been, this court is of the opinion that the accused has been able to prove a probable defence in his favour based upon the material before this court and the prism through which the accused has presented the circumstances of the case, they appear to be probable from a reasonable man's point of view. And that is what is precisely required for the accused to rebut the presumptions raised against him in which he has been successful. Moreover, the question as to the validity of Mr Sandeep Malik being competent to file the present case without there being a power of attorney in his favour, seemed to have clinched the case in the favour of the accused.

33. The burden of proof having thus shifted back on the complainant, he has not been able to prove that the cheques in question were issued in discharge of legally recoverable liability by the accused.

34. The accused is therefore Acquitted for the offence punishable u/s 138 of the Negotiable Instruments Act in respect of the cheques in question.

GAURAV SHARMA

(Announced in open

SHARMA Date:
2019.10.04
02:52:01 +0530

Court on 03.10.2019)

Gaurav Sharma)
MM/NI Act-03/Central.
03.10.2019
Judge Code: DL00855