

5.2012 Ex.Cw1/3 Where It Is Stated That ... vs Brojo Nath on 23 April, 2012

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IN THE COURT OF CIVIL JUDGE-I/METROPOLITAN MAGISTRATE, NEW DELHI
DISTRICT, DELHI

Presided By : Sh. Apoorv Sarvaria, DJS

C.C. No: 144/12

Unique Case ID No. 02403R0024262012

InterGlobe Aviation Limited
Tower C, First Floor,
Global Business Park,
Mehrauli - Gurgaon Road
Gurgaon - 122002

THROUGH
Dhananjay Shahi
Legal Counsel of the complainant

.....Complainant

Versus

CAPT. N.G. Sahu
581, AFNOE, Sector 7, Plot - 11,
Dwarka
New Delhi - 110075

..... Accused

COMPLAINT UNDER SECTION 138 OF THE NEGOTIABLE
INSTRUMENTS ACT, 1881

DATE OF INSTITUTION : 02.01.2012
DATE OF ARGUMENTS : 07.04.2012
DATE OF DECISION : 23.04.2012

C.C. No: 144/12

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JUDGMENT

Brief Facts

1. The brief facts for the purpose of deciding the present complaint are that the complainant InterGlobe Aviation Limited is a private limited company having its registered office at Ground Floor, Central Wing, Thapar House, 124, Janpath, New Delhi - 110001. The complainant is a group company of InterGlobe Enterprises Limited, which is a diversified international corporation dealing with air transport management, travel distribution and integrated travel & technology solutions. It operates the domestic airline by the name of 'IndiGo' which commenced services in 2006. The accused is stated to have entered into a Goodwill/Commitment Agreement with the complainant whereby the accused agreed to join the complainant as a senior co-pilot w.e.f. 01.05.2007. The accused is also stated to have entered into a Pilot Employment Agreement with the complainant on 27.04.2007. On 01.05.2007, the accused entered into a Specialized Training Agreement (hereinafter referred to as "STA") with the complainant and simultaneously joined the services of the complainant as a Senior Co-pilot. As per clause 1 of the STA the accused undertook to serve the complainant for a period of 5 years from the date of employment i.e. 01.05.2007. In terms of clause 2 of STA, the accused was to furnish 5 undated cheques in the amount of Rs.3 lakhs each totaling to Rs.15 lakhs as a guarantee for due performance of the terms and conditions of the STA. It is stated in the complaint that the furnishing of the said amount was towards the approximate total cost of training of the accused that would be incurred by the complainant and also as a guarantee for due performance of the obligations of the accused under the STA and liquidated damages in the event of the failure of C.C. No: 144/12 performance of obligations under STA by the accused.

2. It is further stated in the complaint that as per clause 2 of the STA, it was agreed that upon successful completion of each year of the term, the complainant company shall return one cheque to the accused. In pursuance of the STA, the accused issued 5 cheques (002308, 002309, 002310, 002311 and 002312) in favour of the complainant drawn on ICICI Bank Ltd., Dwarka Branch, New Delhi of Rs.3 lakhs each totaling to Rs. 15 lakhs. The specialised training of the accused took place between 17.06.2007 and 08.08.2007. The cost of training alone is stated to be US \$ 23,588 amounting to Rs.10,37,000/- as per the exchange rate prevalent at the said time. The complainant is stated to have further incurred the expenditure of Rs.2,87,000/- Rs.2,60,000/- and Rs. 18,000/- under the heads of Stay & Daily Allowance, Aircraft Familiarization (Base) Training and Ticket Costs respectively. The total payable expenditure incurred by the complainant is stated to be Rs.16,02,000/- It is further stated in the complaint that the accused tendered his resignation on 08.04.2008. By this time, the complainant had already returned back cheque (002308) to the accused in terms of Clause 2 of the STA. It is further stated in the complaint that since the accused had committed breach of the STA by tendering his resignation on 08.04.2008, he became liable to pay Rs. 12,00,000/- to the complainant under the cheques already deposited by the accused with the complainant in terms of the STA. Thereafter, the complainant deposited the remaining 4 cheques (002309, 002310, 002311 and 002312) all dated 15.10.2008 with its banker, HDFC Bank, Gurgaon. The said cheques were returned unpaid vide cheque returning memos by the banker of the accused on 16.10.2008 with the remarks "Payment Stopped by Drawer".

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3. Thereafter, the complainant sent a legal notice dated 10.11.2008 to the accused by registered post and courier. The accused failed to pay the amount demanded within 15 days of the receipt of the said

legal demand notice. On the strength of the aforesaid facts, the complainant has alleged that the accused is liable to be tried and punished for the offence punishable under Section 138 of the NI Act.

Proceedings before Court

4. The present complaint was received by way of assignment on 07.01.2009. On the basis of pre-☐ summoning evidence led by the complainant, the Ld. Predecessor had taken cognizance of the offence u/s 138 of the NI Act and summoned the accused. The accused entered the appearance and was granted bail. On 16.07.2009, a notice of accusation u/s 251 of Cr.P.C. was framed against the accused by the Ld. Predecessor Court. The notice had been read over and explained to the accused. The accused had pleaded not guilty and claimed trial.

5. During trial, the complainant examined Sh. Dhananjay Shahi, Legal Counsel of the complainant as CW1. In examination in chief, the Legal Counsel of the complainant tendered in evidence his affidavit Ex.CW1/1A and documents Ex.CW1/A to Ex.CW1/F. Thereafter, the CW1 was cross-☐ examined.

6. During examination u/s 313 of Cr.P.C., the accused admitted issuing the four cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) and having issued stop payment instructions to its bank. He further admitted receiving the legal demand notice dated 10.11.2008 Ex.CW1/6 to which he replied vide letter dated 25.11.2008 Ex.CW1/8.

7. In support of his defence, the accused examined himself as RW1 and tendered his evidence by way of affidavit Ex.RW1/X. Thereafter, the accused was cross-☐ examined. C.C. No: 144/12 Submissions of Advocates

8. This Court has heard arguments from Sh. Siddharth Sethi, Ld. Advocate for the complainant and Sh. Shraman Sinha, Ld. Advocate for the accused. Sh. Siddharth Sethi, Ld. Advocate for the complainant drew reference to the Pilot Employment Agreement dated 27.04.2007 Ex.CW1/B and made specific reference to the heading no. 10 "Training" of the General Terms and Conditions (Annexure 2 to the Pilot Employment Agreement). He submitted that under the heading no.10 "Training", it was mentioned that a pilot may be required to undergo specialized training/skill/knowledge enhancement/developmental programme to enable him to effectively discharge his flying responsibilities. In such cases the complainant may propose that an agreement be entered between the pilot and the complainant as Specialized Training Agreement. It is further stated in the said heading that in the event that such an agreement is executed between the pilot and the company, it shall be considered as an integral part of this Pilot Employment Agreement. He, therefore, submitted that the STA is an integral part of the Pilot Employment Agreement. Sh. Siddharth Sethi, further made reference to clause 1 and clause 2 of the STA dated 01.05.2007 Ex.CW1/3 whereby the accused had undertaken to serve the complainant for 5 years and the accused furnished 5 undated cheques by way of guarantee for performance of the obligations under the STA. He further made reference to clause 3 (a) of the STA whereby it is mentioned that if the employee leaves or abandons the employment of the complainant or resigns from the services of the complainant before the completion of the term, then the employee (accused herein) shall be liable to

forthwith pay the company liquidated damages of breach of contract for the balance period till the completion of the term in C.C. No: 144/12 an amount equal to the undated cheques not previously returned to the employee. As stated in clause 3 of the STA, this sum of liquidated damages was for the costs of training a replacement, disruption in schedules, opportunity cost and any other costs incurred by the complainant company in connection with such employee ceasing to be in the services of the complainant company.

9. The Ld. Advocate for the complainant also referred to the cross examination of the accused whereby the accused had admitted that prior to joining the complainant he had never flown Airbus A320 Aircraft. He further admitted in his cross examination that prior to joining the complainant he was not certified or permitted to fly commercial Airbus A320 Aircraft. He further admitted in his cross examination that for commercial purposes certification is required for each different type of aircraft as per DGCA Regulations. By referring to this cross examination, the Ld. Advocate for the complainant submitted that the accused himself admitted that he did not possess the qualification to fly the Airbus A320 Aircraft for commercial purposes before joining the complainant company. The Ld. Advocate for the complainant also drew reference to the e-mail dated 08.04.2008, Ex.CW1/F of the accused to Mr. K.S. Bakshi, the Office President (HR) of the complainant company whereby the accused put his resignation to the complainant company. In terms of the said e-mail, the accused was willing to pay off the obligations outstanding against him. Ld. Advocate for the complainant further submitted that the resignation of the accused was effective from 30.09.2008. He also referred to the invoice dated 05.06.2007 Ex.CW1/C and receipts dated 13.06.2007 Ex.CW1/D.

10. On the other hand, the Ld. Advocate for the accused Sh. Shraman Sinha made four C.C. No: 144/12 submissions in favour of the accused. Firstly, he submitted that the cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) are based on the STA. The accused suffered false suspension from the complainant company which was later withdrawn by the complainant company. The timings of the work was very bad and the breach of contract as suggested by the complainant was because the contract was made impossible to perform by the accused. Secondly, he submitted that there is a Civil Suit filed by the accused for Rs.17 lakhs against the complainant company and the said Civil Suit is pending before the Court of Ld. Additional District Judge. Thirdly, he submitted that the liquidated damages as per the STA cannot be termed as liquidated damages. For this purpose, he relied upon the decision of the Hon'ble Supreme Court in Union of India v Raman Iron Foundry AIR 1974 SC 1265. He, therefore, submitted that till liquidated damages are ascertained by the fiat of the Court, no liability accrued to the complainant. The fourth submission made by the Ld. Advocate for the accused is that these cheques were taken by the complainant as a security for performance of the contract. For this purpose, he drew specific reference to para 2 of the STA dated 01.05.2012 Ex.CW1/3 where it is stated that the 5 undated cheques were presented by way of guarantee for due performance by the employee (accused). He further referred to para 3 and 4 of the complaint where complainant had admitted that these cheques were issued as a guarantee for due performance of the obligations under the STA. He also made reference to the cross examination of CW1 Sh. Dhananjay Shahi, whereby CW1 himself admitted putting dates on the 4 cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d). He also relied upon the decisions in Shanku Concretes Pvt. Ltd. v State of Gujarat and

Another 2000 (3) Crimes 602, Collage C.C. No: 144/12 Culture & Ors. V Apparel Export Promotion Council 2007 (99) DRJ 251, M/s. Narayana Menon v State of Kerala and Another 2006 (6) SCC 39 and Ramakrishna Urban Cooperative Credit Society Ltd. v Rajendra Bhagchand Warma II (2010) BC 481 (Bombay) in support of his submission that security cheques cannot be issued in discharge of any legally recoverable debt or liability owed to the complainant.

Findings

11. In the present case, the 4 cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) dated 15.10.2008 were presented by the complainant within 6 months from the date of cheque. The cheque returning memos Ex.CW1/5(a) to Ex.CW1/5(d) were received on 16.10.2008. Thereafter, the legal demand notice Ex.CW1/6 dated 10.11.2008 was sent to the accused. The accused failed to make the payment within the stipulated time as prescribed under Section 138 of the NI Act, 1881. Thereafter, the present complaint was filed on 02.01.2009. Hence, the complaint is within the period of limitation. Therefore, the essential prerequisites have been satisfied for raising the presumptions under Sections 118(a), 118(b) and Section 139 of the NI Act. Section 139 of the NI Act raises the presumption that the holder of a cheque received the cheque for discharge, in whole or in part of any debt or other liability.

12. In Rangappa v. Mohan AIR 2010 SC 1898, it was observed as under:

"14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned C.C. No: 144/12 observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. 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 accused/defendant cannot be expected to discharge an unduly C.C. No: 144/12 high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when

an accused has to rebut the presumption under Section 139, 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 the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

13. The present case deals with dishonour of cheques due to stop payment instructions issued by the accused. The law relating to stop payment instructions in the cases of dishonour of cheques u/s 138 of the NI Act has been laid down by the Hon'ble Supreme Court in MMTTC Ltd. and another v M/s Medchl Chemicals and Pharma (P) Ltd. and another AIR 2002 SC 182 as follows: (AIR @ p. 186) "17. Lastly it was submitted that complaint under Section 138 could only be maintained if the cheque was dishonoured for reason of funds being insufficient to honour the cheque or if the amount of the cheque exceeds the amount in the account. It is submitted that as payment of the cheques had been stopped C.C. No: 144/12 by the drawer one of the ingredient of Section 138 was not fulfilled and thus the complaints were not maintainable.

18. Just such a contention has been negated by this Court has, in the case of Modi Cements Ltd. v Kuchil Kumar Nandi reported in (1998) 3 SCC 249. It has been held that even though the cheque is dishonoured by reason of 'stop payment' instruction an offence under Section 138 could still be made out. It is held that presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stop payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving C.C. No: 144/12 would be on the accused. Thus a Court cannot quash a complaint on this ground". (emphasis added)

14. In accordance with the decision of the Hon'ble Supreme Court in MMTTC Ltd., for rebutting the presumption u/s 139 of the NI Act the accused has to show that there were sufficient funds in his account to clear the amount of the cheque at the time of its presentation for encashment at the drawer bank. He is also to show that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheques for encashment.

15. The accused has not produced any bank statement in his defence to show that there were sufficient funds in his bank account at the time of presentation of cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d).

16. The accused has also to show that there were sufficient reasons in the present case for issuing stop payment instructions, which includes the non existence of a legally recoverable debt. For determining that, this Court would have to ascertain whether the guarantee for the performance of the terms of contract, i.e. the STA in the present case, can be said to be a legally recoverable debt or liability for the purpose of attracting the provisions of Section 138 of the NI Act. Preliminary to this, this Court has to ascertain whether the terms of the STA that required the accused to serve the complainant company for five years is lawful. Clause 1 of the STA provides that the accused had undertaken to serve the complainant company for a minimum period of five years from the date of employment. In terms of Clause 2 of the STA, the accused had furnished five undated cheques of Rs.3 lakhs to the complainant as guarantee for due performance of the terms and conditions of the STA. Ld. Advocate for the accused C.C. No: 144/12 had submitted that this condition itself is void and he relied upon the decision of the Hon'ble Supreme Court in Central Inland Water Corporation Vs. Brojo Nath Ganguly AIR 1986 SC 1571. In the considered view of this Court, the said decision has no bearing on the facts of the present case since it relates to matters relating to employment in public sector and not in private sector. (See A.N. Shukul v. Philips India 165 (2009) DLT 58; Y.K. Sethi v. BASF India (2010) I LLJ 493 (Del)).

17. Insofar as the argument of Ld. Advocate for the accused that till liquidated damages are ascertained by the Civil Court no liability can accrue in favour of the complainant, this Court finds the submission to be without any merit since the decision of the Hon'ble Supreme Court in Vishnu Dutt Sharma v Daya Sapra (2009) 13 SCC 729, as relied upon by the Ld. Advocate for the complainant, is clear on the point that the creditor can maintain civil and criminal proceedings at the same time. Therefore, civil and criminal proceedings are independent of each other and the pendency of civil proceedings for ascertainment of liquidated damages is no bar to the conclusion of criminal proceedings.

18. Learned Advocate for the accused had also submitted that the accused had issued the cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) to the complainant as security cheques. Admittedly, these cheques were issued as undated cheques to the complainant. Therefore, the presumption under Section 20 of the NI Act comes in favour of the complainant regarding implied authority given to complainant to fill up the date of the said cheques. Ld. Advocate for the complainant has relied upon decision of the Hon'ble High Court of Delhi in MOJJ Engineering System Ltd. v. A.B. Sugars Ltd. 154 (2008) DLT 579 on the point of an undated cheque. Reading the said C.C. No: 144/12 decision along with Section 20 of the NI Act, the accused had given an implied authority to the complainant to fill up the date on the said cheque and complete the said Negotiable Instrument.

19. As regards the question whether the cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) were issued as security cheques, in the considered view of this Court, the said cheques did not remain security cheques once the accused resigned from the complainant company before the expiry of the term as provided in the STA. Further, the decision of the Hon'ble High Court of Delhi in K.S. Bakshi v State 146 (2008) DLT 125 has made a distinction between a cheque issued by way of security and a cheque issued towards discharge of a liability to pay notwithstanding that the money is by way of security for the due performance of the contract. In the said decision, it is

observed as follows:

"31. A distinction has to be drawn between a cheque issued as security and a cheque issued towards discharge of a liability to pay notwithstanding that the money is by way of security for due performance of the contract. A cheque given as security is not to be encashed in present. It becomes enforceable if an obligation in future is not enforced. It is not tendered in discharge of a liability which has accrued.

32. Thus where a cheque forms part of a consideration under a contract it is paid towards a liability."

20. Admittedly, in the present case, the cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) were issued as guarantee for due performance by the accused of C.C. No: 144/12 the terms and conditions of the STA. Therefore, the said cheques cannot be said to be in the nature of security issued by the accused to the complainant once the accused had failed to perform the obligations under the STA and left the complainant company. The decisions in *Shanku Concretes Pvt. Ltd. v State of Gujarat and Another* 2000 (3) Crimes 602, *Collage Culture & Ors. V Apparel Export Promotion Council* 2007 (99) DRJ 251, *M.S. Narayana Menon v State of Kerala and Another* (2006) 6 SCC 39 and *Ramakrishna Urban Cooperative Credit Society Ltd. v Rajendra Bhagchand Warma II* (2010) BC 481 (Bombay) relied upon by Ld. Advocate for the accused turn on their own facts and are not applicable to the present case.

21. In his examination in chief by way of affidavit, the accused has stated that the complainant had to pay his dues of Rs. 17,47,198/- and the complainant had withheld his salary and allowances, including provident fund. However, the accused has not produced any documentary evidence to substantiate this. No service record was called from the complainant company or the regional provident fund department to prove any such dues. No salary slip has been produced, neither has any document been produced in evidence whereby the complainant has acknowledged its liability towards the accused. Hence, the accused has failed to prove that there were sufficient reasons in the present case for issuing stop payment instructions, which includes the non existence of a legally recoverable debt.

22. Therefore, the accused has failed to rebut the presumption under Section 139 of the NI Act in the present case.

23. In *Joseph Jose v. J. Baby* 2002 Cri LJ 4392 (Ker), it has been observed that burden of proof as to cheque has not been issued for legal debt or liability is always on C.C. No: 144/12 accused. The complainant is not required to adduce number of witnesses and bulk of documentary evidence on the question.

24. Even otherwise, the complainant has placed on record invoices Ex.CW1/C and Ex.CW1/D which relate to the expenses incurred by the complainant in training of the accused. The complainant has also placed on record the e-mail dated 08.04.2008 Ex. CW1/F of the accused whereby the accused while giving notice of resignation to the complainant stated that he was ready to pay off the

obligations outstanding against him and requested for warning period of 4-5 days to arrange for the finances against the cheques issued to the complainant at the time of signing the contract. Ld. Advocate for the accused submitted that the invoices Ex.CW1/C and Ex.CW1/D and the e-mail Ex. CW1/F have not been sufficiently proved by the complainant. In the considered view of this Court, it is not open for the accused to challenge the mode of proof of invoices Ex.CW1/C, Ex.CW1/D and the e-mail Ex. CW1/F at this stage. There were no objections raised on behalf of the accused at the time of tendering the said invoices in evidence (See R.V.E. Venkatachala Gounder v Arulmigu Viswesaraswami and V.P. Temple and Anr. AIR 2003 SC 4548).

25. Therefore, the complainant has proved beyond reasonable doubt that the cheques Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) were issued in discharge of legally recoverable liability towards the complainant.

26. Thus, as a net result of the aforesaid analysis, the accused is convicted of the offence defined under Section 138 of the NI Act, 1881 in respect of dishonoured cheques (002309, 002310, 002311 and 002312) dated 15.10.2008 Ex.CW1/4(a), Ex.CW1/4(b), Ex.CW1/4(c) and Ex.CW1/4(d) of Rs.3,00,000/-each.

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27. The accused shall be heard on the quantum of sentence on 25.04.2012 at 4 PM. .

Announced in the Open Court
On 23.04.2012

(Apoorv Sarvaria)
Civil Judge-I/MM, New Delhi District
New Delhi

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