

Cc No. 140/10 Axis Bank vs Pawan Gandhi 1/12 on 2 February, 2012

IN THE COURT OF MS MANISHA TRIPATHY: MM (09): SPECIAL
COURT NO.9: DWARKA COURT: NEW DELHI

In the matter of: -
CC NO.:140/10

AXIS BANK LTD. (FORMERLY KNOWN AS U.T.I. BANK LTD.)
AT TRISHUL, 3RD FLOOR,
LAW GARDEN, ELLISBRIDGE,
AHMEDABAD-380009
ALSO AT
(BRANCH OFFICE)
4/6 B, ASAF ALI ROAD, NEW DELHI
THROUGH MR. GOPAL BORA,
DUPTY MANAGER, R.A.C. AXIS BANK LTD.
AUTHORISED REPRESENTATIVE

... Complainant

Vs.

PAWAN GANDHI
13/5, FIRST FLOOR,
INDIRA VIKAS COLONY,
DELHI-110060

ALSO AT: OFFICIAL ADDRESS
1980, GROUND FLOOR,
OUTRAM LINE,
KINGSWAY CAMP,
NRN, DELHI-110009

....Accused

CC No. 140/10	Axis Bank Vs Pawan Gandhi	1/12	
Date of Institution of Complaint	:		27/01/20
Date of Final Arguments Heard	:		11/01/20
Date of Decision	:		02/02/20
Decision	:		Convicted

– : JUDGMENT : –

1.

The present case was instituted upon a complaint filed by Axis Bank Ltd. (henceforth complainant) against Sh. Pawan Gandhi (henceforth accused) u/s 138 of Negotiable Instrument Act alleging that the accused had taken Personal loan of Rs. 3,93,000/-(Rupees Three Lac Ninety Three Thousand Only) from the complainant. For part payment of the said loan the accused issued cheques bearing nos. '006077', '006078', '006079', '006080' & '006081' dated 20/06/09, 20/07/09, 20/08/09, 20/09/09 & 20/10/09 respectively, each in the sum of Rs. 11,606/-(Rupees Eleven Thousand Six Hundred Six Only) drawn on Centurian Bank of Punjab Ltd. in favour of complainant. Upon presentation for encashment the said cheques were returned unpaid vide returning memo dated 12/11/2009 with remarks 'Funds Insufficient'. The complainant sent a legal notice to the accused on 11/12/2009 demanding the cheques' amount. The accused failed to make the payment of the cheques' amount despite service of notice to him. Thus the present complaint was filed on 27/01/2010.

2. The complainant relied on following documents □CC No. 140/10 Axis Bank Vs Pawan Gandhi 2/12 i. Evidence by way of affidavit Ex.CW1/A ii Photocopy of office order, extract of Board Resolution Ex.CW1/2 (colly) iii cheque bearing no. '006077' dated 20/10/2009 Ex.CW1/3 iv cheque bearing no. '006078' dated 20/09/2009 Ex.CW1/4 v cheque bearing no. '006079' dated 20/08/2009 Ex.CW1/5 vi cheque bearing no. '006080' dated 20/07/2009 Ex.CW1/6 vii cheque bearing no. '006081' dated 20/06/2009 Ex.CW1/7 viii cheque return memo dated 12/11/2009 Ex.CW1/8(colly) ix legal notice dated 11/12/2009 Ex.CW1/9 x courier receipts Ex.CW1/10& xii delivery report of courier Ex.CW1/13 xiv Request letter for Top Up loan Ex.CW1/15 xv Balance transfer authority letter Ex.CW1/16 xvii Statement of account Ex.CW1/18

3. After perusal of material on record and examination of the witness of the complainant, the accused was summoned on 02/02/2010. The accused made first appearance on 30/08/2010. Notice u/s 251 CrPC was served upon him on 26/11/2010 wherein he pleaded not guilty and claimed trial.

4. Thereafter, all incriminating evidence against the accused was put before him and opportunity was given to him to explain the evidence appearing against him. His CC No. 140/10 Axis Bank Vs Pawan Gandhi 3/12 statement u/s 313 Cr.P.C. was recorded on 03/10/2011. Thereafter, defence evidence was led by the accused.

5. The accused led following evidence□i Deposition of Accused himself u/s. 315 Cr..P.C. DW1

6. Thereafter, final arguments were advanced by both the parties. I have given my thoughtful consideration to the arguments advanced by both the ld. Counsels.

7. Ld. counsel for the complainant argued that cheques were drawn by the accused for discharge of legal liability towards the loan and were returned unpaid by the accused due to insufficient funds. Complainant sent the legal demand notice within one month and no payment was made within 15 days after receipt of legal demand notice. Complainant was filed within 30 days after cause of action arose. Legal liability was existing against the accused in discharge of which cheques were given which were dishonoured and offence u/s 138 of Negotiable Instrument Act was made out.

8. Before proceeding further it will be useful to have a look at relevant provision of s. 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 CC No. 140/10 Axis Bank Vs Pawan Gandhi 4/12 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 provisions of this Act, be punished with imprisonment for "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, "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."

9. For an offence under s. 138 NI Act essential ingredients that must be established are—• Issuance of cheque by the accused on an account maintained by him with a CC No. 140/10 Axis Bank Vs Pawan Gandhi 5/12 bank;

- The cheque must have been issued in discharge of legal debt or liability;
- The cheque must have been presented to the bank within the period of six months from the date of the cheque or within the period of its validity;
- Upon presentation for encashment, the cheque must have been returned unpaid;

- The payee of the cheque must have issued legal notice of demand within 30 days from the receipt of the information by him from the bank regarding the return of the cheque;
- The drawer of the cheque failed to make the payment within 15 days of the receipt of the aforesaid legal demand notice.

10. Admittedly, the cheques in question were issued by the accused. The cheques were presented to the bank within validity period and were returned unpaid because the amount standing to the credit of the accused was insufficient to honour the cheques is established by cheque return memo dated 12/11/09 Ex.CW1/8(colly). Legal notice demanding the cheques' amount was dispatched at the address of the accused within statutory period of 30 days is established by copy of legal notice Ex.CW1/9 and original courier receipts Ex.CW1/10,Ex.CW1/11 and UPC receipt Ex.CW1/12. Non compliance of legal demand notice is not disputed by the accused.

11. The issues raised by the accused in his defense and that are to be determined by this court are :

CC No. 140/10 Axis Bank Vs Pawan Gandhi 6/12 i. Whether legal demand notice was received by the accused as envisaged u/s. 138 N.I.Act.

ii. Whether impugned cheques were issued as security or in discharge of liability towards the loan.

Whether legal demand notice was received by the accused as envisaged u/s. 138 N.I. Act

12. As far as first issue of non-service of legal demand notice is concerned it was argued on behalf of the accused that the accused didn't receive legal demand notice whereas Ld. Counsel for the complainant argued that legal notice was dispatched at the correct address of the accused and by virtue of S. 27 General Clauses Act, 1927, the legal notice is deemed to have been served upon the accused.

13. Section 27 General Clauses Act lays down as under:

"27. Meaning of service by post—Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of CC No. 140/10 Axis Bank Vs Pawan Gandhi 7/12 post."

14. In this regard, it has been held by Hon'ble High Court of Delhi in Prakash Jewellers vs A.K. Jewellers [99 (2002) DLT 244] that payee or the holder of the cheque is entitled to claim the benefit of presumption of service once he has dispatched the demand notice through registered post or postal certificate on the correct address of the sendee written on it and where he had proved such

dispatch through original receipts. The Hon'ble Court went on to clarify that presumption of service by post under s. 27 of General Clauses Act is rebuttable. But such rebuttal doesn't assume finality merely because of sendee's denial to receive the notice. It would be so only where the sendee proves that he had not in fact received the notice and that he was not responsible for such non-service.

15. In the instant case, dispatch of legal demand notice has been proved by the complainant by original courier receipts Ex.CW1/10 & Ex.CW1/11 both dated 11/12/2009 and original UPC receipt Ex.CW1/12 dated 11/12/2009. Authenticity of the courier and UPC receipts as well as correctness of address is not challenged by the accused. Thus, legal demand notice was sent at correct address of the accused within statutory period. No witness from postal department was examined on behalf of the accused to show that he had in fact not received the legal demand notice. Therefore, accused has failed to rebutt the presumption u/s 27 General Clauses Act and legal demand notice is deemed to have been served upon him.

CC No. 140/10 Axis Bank Vs Pawan Gandhi 8/12

16. Even otherwise, it has been held by Hon'ble Supreme Court of India in C.C. Alvi Haji V. Palapetty Muhammed & Anr. 2007 STPL(DC) 952 SC that even if the accused didn't receive the legal demand notice he can pay the cheque amount within 15 days of service of summons from the court but if he fails, he can't contend that he has not received the legal demand notice. The relevant extract is reproduced hereinbelow: "para 17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran's case (supra), 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."

CC No. 140/10 Axis Bank Vs Pawan Gandhi 9/12

17. In the instant case, accused after his appearance on 30/08/2010 before the court did not submit that he did not pay the cheque amount within statutory period only because he was not served with legal demand notice and given an opportunity, he was willing to pay the cheque amount to the complainant within 15 days. In view of the judgment of Hon'ble Supreme Court mentioned above, the accused now can not take the plea that he was not served with legal demand notice. Whether the impugned cheques were issued as security or in discharge of legal liability?

18. As far as the second issue of the cheques being given as security for availing personal loan is concerned, before proceeding further, it shall be useful to have a look at relevant provision i.e. Section 139 N.I. Act.

"139. Presumption in favour of holder—It shall be presumed, unless the Contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, or any debt or other liability."

19. Thus, under S.139 N.I. Act, complainant is entitled to presumption that impugned cheques were issued in discharge of liability. However, the said presumption is rebuttable. Accused can rebut the presumption by bringing on record the evidence, including that led by the complainant which show preponderance of probabilities in its favour.

CC No. 140/10 Axis Bank Vs Pawan Gandhi 10/12

20. Apart from presumption in its favour, complainant also relied upon request letter for Top Up loan Ex.CW1/15, balance transfer authority letter Ex.CW1/16 and loan agreement Ex.CW1/17. Signatures therein were admitted by the accused. Though several contentions were raised by the accused. Firstly, it was contended that the stamp on the loan agreement bears date of 13/12/2007 which is different from the date mentioned in para no.1 of page no.1 where date of execution of agreement is mentioned as 24/01/2008. It was explained by Ld. Counsel for the complainant that difference in date of stamp and date of execution of loan agreement is not relevant as purpose of the said stamp is revenue to the government and the said stamp can be affixed anytime prior to execution of loan agreement. In view thereof, the so called inconsistency is accepted as properly explained. Secondly, it was also contended by the accused that he had signed blank loan agreement. In support of his contention he argued that the fact that the standing instructions which is part of Ex. CW1/17 bears signature of the accused even though the said instruction is blank shows that the accused had signed blank loan agreement and details thereon have been filled later on by officials of the complainant. It is to be noted that the Ex.CW1/17 is a typed standard form agreement and certain details such as amount of loan, rate of interest, amount and number of installments etc. have been filled by hand. All such details filled by hands have not been disputed by the accused. The only disputed fact is issuance of cheques as security. Case of the accused is that he had issued 48 blank cheques as security whereas it is mentioned in para 3 of page 3 of the loan agreement that the accused has handed over post dated cheques setting out amount for each installment and the date on the same was payable. The said cheques could be used to adjust and appropriate the amount of due installments as on the date mentioned CC No. 140/10 Axis Bank Vs Pawan Gandhi 11/12 thereon. As relevant clauses pertaining to the issue in hand are type, the accused is presumed to have read these clauses before signing the same [vide *Grasim Industries Ltd. & Another. V Aggrawal Steel* 2010 (1) SCC 83] . In the circumstances, such cheques can't be said to be issued as security, rather the same were additional mode of payment of monthly installments. Even though accused claimed that loan was repayable through ECS only, no evidence was brought on record to support the testimony of the accused in this regard. Particularly in view of the loan agreement Ex.CW1/17 where no mode has been fixed for repayment, contention of the accused is not tenable. Admittedly, the installments for the months to which impugned cheques pertain were due upon the accused. The complainant was

justified in presenting the impugned cheques in terms of loan agreement.

21. In view of the discussion above, the complainant has successfully proved its case whereas all the pleas taken by the accused are not proved. The Accused is accordingly convicted of offence u/s 138 of Negotiable Instrument Act. Announce in Open Court 02/02/2012 (MANISHA TRIPATHY) METROPOLITAN MAGISTRATE, SPECIAL COURT(09), DWARKA COURTS, NEW DELHI CC No. 140/10 Axis Bank Vs Pawan Gandhi 12/12