

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

CRMC No. 234/2015

**Pronounced on:- 20th .05.2020
(through video conferencing)**

Mohammad Altaf Shah

...Petitioner(s)

Through: Mr. Shaqir Haqani, Advocate

vs.

Ghulam Qadir Langoo

...Respondent(s)

Through: Mr. B. A Bashir, Sr. Advocate

CORAM: HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

1. Petitioner has filed this petition for quashing of proceedings initiated against him under section 138/142 of the Negotiable Instrument Act alleging dishonor of cheque No. 052001 dated 01.07.2013 for Rs. 4,20,000/-. The complaint was presented to the Chief Judicial Magistrate, Srinagar on 31.07.2013, who transferred the same to Forest Magistrate on the same day, and after recording the statements of the complainant-respondent and his son-Riyaz Ahmad Langoo, the trial court summoned the accused directing as under:

“Heard the counsel for the complainant. Perusal of the record of the complaint which has supported the contents of the complaint. As such, there is a material on record to proceed against the accused for offence under section 138/N.I Act disclosed against the accused. The cognizance u/s 138/N.I Act is hereby taken against the accused. Office is directed to issue summon/notice through Police Station concerned to the accused for his appearance. The complainant is directed to get summon/notice from the court and assist S.O Taamilat

for service of the accused. Put up on 30.08.2013.”

2. The complaint during the period it remained pending, affidavits of Muneeb-U-Zamaan Pehalivi, Altaf Ahmad Bhat and Riyaz Ahmad Langoo and complainant in support of the allegation made in the complaint were filed. The Bank Manager who was also named as one of the witnesses by the complainant could not be examined while all the affidavits of prosecution witnesses were filed by 16.12.2013 but no effective steps were taken by the court for the cross-examination of the witnesses until 18.11.2015 when notice of this court was received regarding the stay of further proceedings. So nearly two years were spent by adjourning the case without taking effective steps to decide within six months as it was summon case.
3. Be that as it may, the petitioner has questioned the maintainability of the complaint on two counts, first, that no case is made out on the basis of the contents disclosed, as the processes could not be issued. Secondly, there was no application of mind by the court below before issuing the process, which is an abuse of the process of law.
4. The other ground is that as per the license deed dated 21.05.2013, the petitioner was licensee of the Guest House for 11 months on payment of license fee of Rs. 12,30,000/- which had to be paid in three installments as per the agreement. Copy of the agreement is annexed with the petition and the respondents have not denied the contents made in the affidavit.
5. It has been found that respondent has submitted his affidavit alongwith three affidavits of his witnesses. It is the admitted case of the complainant-respondent that he is the owner of New Zeenat

Guest House. Para 1 of his affidavit dated 30.12.2013 reads as under;

“1. That I am the proprietor of the New Zeenith Guest House Dalgate Srinagar and the accused approached me for granting license for running his business in my aforesaid Guest House and I accepted his request and I licensed my aforesaid Guest house on license for 11 months against license fee of Rs. 12,30,000/- payable by the accused in three installments of Rs. 4,00,000/-, Rs. 4,20,000/-, and Rs. 4,10,000/- and in liquidation of the license fee the accused issued cheque No. 052001 dated 1-7-2013 for amount of Rs. 4,20,000/- in favour of the complainant payable at J&K Bank Branch B. P. Batamaloo Sgr.”

6. Para 1 of the affidavits of his witnesses, namely, Muneeb-U-Zamaan Pehalivi, Altaf Ahmed Bhat and Riyaz Ahmed Langoo is identical to para 1 of the affidavit of the complaint-Ghulam Qadir Langoo. As all of them admit that the petitioner was licensee of Zeenat Guest house for 11 months on payment of Rs. 12,30,000/- as licensee fee payable in three installments of Rs. 4,00,000/-, 4,20,000/- and Rs. 4,10,000/-.
7. The dispute arose only when cheque No. 052001 dated 01.07.2013 was dishonoured by the bank as payment was stopped by the petitioner who has annexed a copy of the license deed dated 01.05.2017 executed between the parties, and the execution of license deed has not been denied by the complainant and his witnesses in their affidavits. The contents of the affidavits of the complainant-respondent and his Son-Riyaz Ahmad Langoo un-mistakably point out that the licensee deed annexure-P filed by the petitioner gives the details of the license fee as stated in the affidavit by the respondent and his witnesses. Para 1 of the license agreement describes license

fee for 11 months was Rs. 12, 30,000/-. Para 4 and 5 state that how and when the payment was to be made. Para 13 of the agreements speaks of the post-dated cheques for Rs. 4,20,000/- and Rs. 4,10,000/- moreover, as per the rent receipt dated 01.05.2013, cheque No. 052001 dated 01.07.2013 and cheque dated 10.11.2013 for Rs. 4,10,000/- were post-dated issued in advance towards payment of license fee. What is important is para 13 of the agreement which reads as under:-

“13. That the cheques (Post dated bearing No. 052001 dated 1.7.2013 to the tune of Rs. 4,20,000/- and another bearing No. 052006 dated 10.11.2013 to the tune of Rs. 4,10,000/- payable at J&K Bank Branch Batamaloo issued by Part No. II to the party No. 1st if bounded at the proper time in that event the party No. II binds themselves in terms of this instant agreement that they have not right to occupy the said guest house and are also liable to penal consequences.”

8. So it is admitted that Rs. 4,00,000/- stood received by the respondent. Agreement between the parties is that in case any of the cheques bounced, the licensee will have no right to remain in possession. It is clear from the above that the complainant withheld the license deed apprehending that process may not be issued in view of para 13 of the agreement. This is because explanation to section 138 of the Negotiable Instrument Act says “for the purpose of this section debt or other liability means a legally enforceable debt or other liability”. Para 1 of the complaint reads as under:

“1. That the accused was indebted to the complainant for an amount of Rupees four Lakhs and twenty thousand

(Rs.4,20,000/-) and in discharge of the said debt the accused issued cheque for Rupees Four Lakhs and twenty thousand (Rs. 4,20,000/-) in favour of the complainant payable at J&K Bank Branch B. P Batmaloo bearing cheque no. 052001 dated 01.07.2013.”

9. That the learned Magistrate assumed that the debt was illegally payable since the cheque was issued so the presumption arose under section 139 but he ignored the law as laid down by Supreme Court in 2008(4) SCC 54 by their lordships in **Rangappa v. Sri Mohan (2010) 11 SCC 441** holding that:

“20. The counsel appearing for the appellant-accused has relied on a decision given by a Division Bench of this Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde, the operative observations from which are reproduced below(S.B. Sinha, J. at SCC pp. 61-63, paras 29-32 & 34)

“29. Section 138 of the Act has three ingredients viz.:

- (i) That there is a legally enforceable debt;
- (ii) That the cheque was drawn form the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and
- (iii) That the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a

presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.”

10. So it was wrong on the part of the trial court to have raised presumption without asking the complainant to show whether the debt amount was legally payable in terms of the proviso to section 138 of the Act. It was in this background that their lordships further observed that bouncing of cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. Paras 27 and 28 of the **Rangappa’s case (supra)** are reproduced below:

“27. 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 defendant-accused cannot be expected to discharge an unduly high standard or proof.

28. 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."

11. So the affidavits filed as evidence can be relied by the petitioner in support of his plea that it is a civil dispute. However, if in fact it is a civil dispute, it may require a little clarification. The petitioner filed an application under section 156(3) Cr. P.C para 4 and 5 of which are as under:-

“4. That on yesterday, the accused alongwith other gunda type persons turned up at the hotel and thrashed the applicants alongwith staff members presently working in the at the hotel and have broken all the items including crockery, in the hotel and disposes the applicants from the hotel illegally and forcibly having no justification and reasonable caused.

5. That the tourists which have booked their accommodating in the hotel on same day, the accused alongwith the gunda type persons have also threatened the tourists and other customers due to which my business have suffered huge loss and in case the possession of the hotel is not restored the applicants, the applicants shall suffered irreparable loss.”

12. Unfortunately no date of occurrence is mentioned but it appears to be somewhere in August, 2013 as stated by the three witnesses examined by the Sub-Inspector M. Tahseen who was asked to verify the facts by SHO, Police Station Ram Munshi Bagh, Srinagar. The application containing order appears to have been forwarded to SHO, Police Station, Ram Munshi Bagh, Srinagar on 19.08.2013 by the Chief Judicial Magistrate, Srinagar. The officer submitted his report dated 02.11.2013 to the SHO, Police Station, Ram Munshi Bagh, Srinagar and the SHO appears to have considered the said report in the light of license deed. There is some doubt about the occurrence but the fact that payment of cheque No. 052001 dated 01.07.2013 was stopped by the petitioner on account of which the cheque was dishonoured, this attracts Clause 13 of the license deed. It is the date of cheque having bounced which is relevant and not the date on which the respondent acted in terms of clause 13 of the license deed

because the application under section 138 has been ruled out by the parties creating civil right in favour of licensor how he viewed this is a different matter.

13. The fact is that that dishonor of cheque is only a civil wrong and does not constitute a criminal offence because parties are free to contract contrary to the mandate of section 138/142 of the Negotiable Instrument Act. As per the report of police dated 02.11.2013, the respondent is in possession of the licensed property since middle of August, 2013 and whether any license fee for the same was due or respondent has any right is a civil dispute.
14. In view of the aforesaid reasons stated, the revision petition is allowed and proceedings before the Chief Judicial Magistrate under section 138/142 of Negotiable Instrument Act are quashed.
15. **Disposed of** accordingly.

(Sindhu Sharma)
Judge

Srinagar
20th .05.2020
SUNIL-II

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No