

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

**Criminal Appeal No.474 of 2000.**

**Reserved on: 06.09.2005**

**Date of decision: 13.01.2006.**

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**Bal Krishan Sharma**

**....Appellant.**

**Versus**

**Tek Ram**

**.....Respondent.**

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*Coram:*

**The Hon'ble Mr. Justice K C Sood.**

***Whether approved for reporting ?<sup>1</sup>***

**For the Appellant:        Mr.Neeraj Gupta, Advocate.**

**For the Respondent :     Mr.Ramesh Thakur, Advocate.**

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**K C Sood, J.**

Would a cheque issued after the date of closure of on account in a Bank fall within the mischief of Section 138 of the Negotiable Instruments Act ("Act" for short) is the question which calls for an answer in this petition.

Undisputed facts necessary for the disposal of this petition are:

The respondent Tek Ram, hereinafter referred to as the ("Accused") approached the petitioner Bal Krishan Sharma ("Complainant" for short) in September, 1996 for a loan of rupees one lakh saying that he required this amount to discharge his previous liability with the Bank which will enable him to get a loan of rupees 4 lakhs from the Bank and that he would repay the amount. The petitioner accordingly advanced rupees one lakh to the accused in cash and the accused in consideration whereof issued him a

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<sup>1</sup> *Whether reporters of Local Papers may be allowed to see the judgment?*

cheque dated December 13, 1996 drawn on Punjab National Bank, Fozal in the amount of rupees one lakh. The cheque bounced, when the petitioner presented it to the Bank, with the endorsement that the account maintained by the accused with the Bank had been closed.

The evidence led by the petitioner show that the cheque book, from which the cheque in question was issued was drawn, in favour of the accused. This account was maintained by the accused in the name of “Jawala Furniture Works Association” and was closed by the accused on September 16, 1994, i.e, prior to the issuance of the cheque to the petitioner.

Learned trial Magistrate dismissed the complaint holding that in order to invoke Section 138 of the Act, the maintenance of account with the Bank on the date of issuance of the cheque by the accused was necessary so as to bring the dis-honour of the cheque within the scope of Section 138 of the Act.

Another ground for the dismissal of the complaint and acquittal of the accused was that the account in question was maintained in the name of “Jawala Furniture Works Association” and therefore, the cheque must have been issued on behalf of the “Jawala Furniture Works Association” and in the circumstances, it cannot be said that the accused issued the cheque in his personal capacity.

Dis-satisfied with the acquittal of the accused, the complainant is in this petition under Section 378 (4) of the Code of Criminal Procedure.]

Heard Mr. Neeraj Gupta learned counsel for the appellant and Mr. Ramesh Thakur, learned counsel for the respondent.

Chapter-VIII consisting of Section 138 to 147 of the Act was inserted in the Act by an amendment Act of 1988 with effect from

April 1, 1989. This chapter was incorporated in the Act to prevent harassment of the honest drawers. Section 138 reads:

**“138. Dishonour of cheque for insufficiency, etc., of funds in the account.-** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years], 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 in due 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 cheque 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 purposes of this section, “debt or other liability” means a legally enforceable debt or other liability”.

The provisions contained in this Chapter are primarily designed to provide an additional criminal remedy, over and above the civil remedies available to the payee or holder in due course of a cheque. This chapter protects the interests of a payee or holder in due course of a dishonoured cheque. The object of the chapter is to enhance the acceptability of the cheque in settlement of financial liabilities by making the drawer liable for penalties. It is noticed that for establishing the requirements of Section 138, there is no burden on the part of the complainant to prove before a Court the entire details of the transactions resulting in issuance of the cheque. As observed by the Apex Court in *Kusum Ingots and Alloys Limited –v- Pennar Peterson Securities Ltd.*, (2000) 2, SCC 745, the object of bringing Section 138 on statute is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Looking to the object of incorporating Chapter-VIII in the Act, the expression, “on account maintained by him” used in Section 138 of the Act, noticed above, cannot be interpreted to give it a artificial or unrealistic meaning. What the provision says is that the cheque must be drawn on account which the accused **maintained** with the Bank. The status of the account, when the cheque was drawn, whether it was **live** or **dead**, is irrelevant. What the provision says is that the accused must have an account which he maintains or had maintained with the Bank. The Legislature has not used the present continuous tense. The expression used is “on account maintained by him” and not “maintained by him”. The cheque, in my view, should have a reference to an account of the accused irrespective

of the fact whether such account was **live** or **dead** on the date of issuance of the cheque. The interpretation to the expression “on an account maintained by him” as given by the learned Trial Magistrate and contended by the learned counsel for the accused is artificial and beyond the legislative intent. While interpreting the provision, the legislative purpose and goal has to be kept in mind. We cannot lose sight of the fact that in this era, the financial transactions are not dependent on cash and therefore financial transactions by other modes including “cheques” have to be attached credibility.

The following observations of the Supreme Court in *NEPC Micon Ltd. And others –v- Magma Leasing Ltd.*, (1999) 4 *Supreme Court Cases* 253, are apposite:

“10. This Court in the case of Kanwar Singh –v- Delhi Admn while construing Section 418 (i) of the Delhi Municipal Corporation Act, 1959 observed:

‘ It is the duty of the court in construing a statute to give effect to the intention of the legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of the legislature, which is to suppress a mischief, the court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will ‘advance the remedy and suppress the mischief- (emphasis supplied)’.

11. Further, while interpreting the statutory provision rule dealing with penalty under the Drugs and Cosmetics Act, 1940 and the rules in the case of *Swantraj v. State of Maharashtra*, this Court held that every legislation is a social document and

judicial construction seeks to decipher the statutory mission, language permitting, taking the one from the rule in Heydon's case of suppressing the evil and advancing the remedy. The Court held that what must tilt the balance is the purpose of the statute, its potential frustration and judicial avoidance of the mischief by a construction whereby the means of licensing meet the ends of ensuring pure and potent remedies for the people. The Court observed that this liberty with language is sanctified by great Judges and textbooks. Maxwell instructs us in these words:

‘There is no doubt that ‘the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectively the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous, manner that which it has prohibited or enjoined: *quando aliquid prohibetur, prohibetur et omne pe quod devenitur ad illud*.

This manner of construction has two aspects One is that the courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and contrivances which parties may have devised in the

hope of thereby falling outside the Act. When the courts find an attempt at concealment, they will, in the words of Wilmot, C.J. 'brush away the cobweb varnish, and shew the transactions in their true light'."

Their Lordships proceeded to observe:

15. In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above "brush away the cobweb varnish, and shew the transactions in their true light" (Wilmot C.J.) or (by Maxwell) "to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited". Hence, when the cheque is returned by a bank with an endorsement "account closed". It would amount to returning the cheque unpaid because "the amount of money standing to the

credit of that account is insufficient to honour the cheque” as envisaged in Section 138 of the Act”.

If the interpretation as contended by the learned counsel for the accused and the trial court is to be accepted, then a person who receives the cheque will have to ensure that the account is live. If he does not, he runs the risk of losing his money and denial of benefit under Section 138 of the Act. This certainly cannot be the legislative intent. Any account holder with intent to defeat the provisions of Section 138 of the Act, may retain a cheque leaf after closing his account with the Bank to defraud any honest payee. Should such a dis-honest account holder be permitted to escape the proceedings under Section 138 of the Act?.

Learned counsel for the accused would contend that the observations in NEPC Micon Limited were that if a cheque is dishonored on the ground that the account is closed then it would come within the sweep of Section 138 of the Act but if the cheque is issued on a closed account, then such an act of a dishonest person would not fall within the mischief of Section 138 of the Act. It is true that NEPC case does not specifically deal with the cheques issued on accounts closed prior to the date of issuance of the cheque. Nevertheless, this case does not indicate that such cases are intended to be taken out of the sweep of Section 138 of the Act. In my opinion the expression “an account maintained by him” necessarily includes an account which was maintained by him, i.e, the account which has been closed as also the account which is still maintained by him”.

The Supreme Court in *N.A. Issac v. Jeemon P. Abraham and another*, 2005 (1) Civil Court Cases 690 (SC) , interpreted Section 138 of the Act and observed that contention that this provision will not be applicable when the cheque is issued from an



already closed account cannot be upheld as such an interpretation would defeat the object of insertion of the provision in the Act. Their Lordships observed that *“Section 138 does not call for such a narrow construction and approved that expression used in Section 138 of the Act includes the cheques issued on a closed account”*

The findings recorded by the trial Magistrate that Section 138 of the Act is not applicable to a cheque drawn on a closed account, for the reasons recorded above, are not correct and cannot be upheld and liable to be set aside.

So far the second reason that the cheque was drawn by the accused on an account of Jawala Furniture Works Association on which admittedly the accused was member and therefore, the petition was not liable, is concerned, this finding to say the least is without application of mind.

It is admitted position that accused had an account with the Bank which he closed on September 16, 1994 as deposed by Sham Lal Cashier of the Bank and noticed by the learned trial Magistrate that “the accused had closed his account with the Bank on 16.9.1994”. Therefore, by no stretch it can be said that the accused had not maintained any account with the Bank. The findings recorded by the learned trial Magistrate on this aspect of the case is perverse and not based on any material on record.

No other point is urged before me.

In result, the petition is allowed. The impugned judgment of acquittal recorded by the learned trial Magistrate is set aside. The case is sent back to the learned Judicial Magistrate 1st Class, Manali District Kullu with direction that the learned Magistrate shall, after hearing the parties, dispose of the case in the light of the observations made herein above and in accordance with law.

The parties shall appear before the learned trial Magistrate on February 28, 2006. The accused shall furnish fresh bail bonds in the amount of rupees two lakhs with one surety of the like amount to the satisfaction of learned trial Magistrate.

( K C Sood)  
Judge.

January 13, 2006.  
(BM)