

**IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL**

Criminal Appeal No. 117 of 2009

Janardan Singh,
S/o Shri S.N. Singh,
R/o 1637 Ta Colony Pantnagar,
District Udham Singh Nagar.

.....Appellant/complainant

Versus

1. State of Uttaranchal (Now State of Uttarakhand).
2. Shivender Bahadur Singh,
S/o Shri Amar Bahadur Singh,
R/o Sirsa Fama (Bara) Kichha,
District Udham Singh Nagar

.....Respondents/accused

Mr. M.S. Pal, Senior Advocate, assisted by Mr. Deepak Bisht, Advocate, and Mr. Amir Malik, Advocate, present for the appellant/complainant.

Mr. M.A. Khan, A.G.A., present for the State.

Mr. Vinod Sharma, Advocate, present for the respondent No.2/accused.

Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 378 (4) of Code of Criminal Procedure 1973 (for short Cr.P.C.), is directed against judgment and order dated 15.07.2006, passed by 1st Additional Civil Judge (Junior Division)/Judicial Magistrate, Udham Singh Nagar, in Criminal Complaint Case No. 723 of 2006, whereby said court has acquitted the accused/respondent No.2 Shivender Bahadur Singh from the

charge of offence punishable under Section 138 of Negotiable Instruments Act, 1881.

2) Leave was granted by this Court on 04.08.2009, and lower court record was summoned. The accused was served with the notice.

3) Heard learned counsel for the parties on appeal and perused the lower court record.

4) Prosecution story, in brief, is that appellant/complainant Janardan Singh filed a criminal complaint before the trial court stating that he had good acquaintance with the respondent No.2/accused Shivender Bahadur Singh. On account of said relationship, accused asked the complainant for friendly loan of Rs. 50,000/- promising him to repay the same. On 30.03.2000, a cheque No. RUDRAP/SB/96/AK No. 305895 for an amount of Rs. 50,000/- of Bank of Baroda was given by the accused to the complainant, towards the repayment of the loan. It is alleged in the criminal complaint that on presentation of the said cheque before the bankers, the same was received back with an endorsement-“insufficient funds”. When the complainant told about the same to the accused, he (accused) asked the complainant to present the cheque again. It is stated in the criminal complaint on said advise, the cheque was presented once again but received back with the endorsement “insufficient funds”, and as such the cheque got bounced. On

this, complainant sent a notice by registered post to the accused on 29.05.2000, which according to the complainant was refused to be accepted by the accused. With these allegations, a criminal complaint was filed, on which, statement of the complainant was recorded by the trial court under Section 200 of Cr.P.C. The documents like copy of the cheque, information from Bank regarding dishonoring of the cheque, copy of the notice and the receipts were also filed by the complainant. The trial court summoned the accused Shivender Bahadur Singh to face the trial in respect of offence punishable under Section 138 of Negotiable Instruments Act, 1881.

5) The accused pleaded not guilty before the trial court, on which, PW1 Janardan Singh (complainant) got himself examined. PW2 Ram Dev Mishra, Branch Manager of State Bank of India, Pantnagar Branch, was also got examined in support of the prosecution case. Oral and documentary evidence was put to the accused under Section 313 of Cr.P.C., in reply to which, he alleged that the evidence adduced against him is false. However, no evidence in defence was adduced. Trial court after hearing the parties, found that though issuance of cheque and its getting bounced is proved on the record, but service of notice sent under Clause (b) of Negotiable Instruments Act, 1881, is not proved, and acquitted the accused/respondent No.2 Shivender Bahadur Singh on that ground. Aggrieved by said order, the complainant has preferred this appeal.

6) Learned counsel for the appellant/complainant argued before this Court that once it is proved on the record by the complainant, and the trial court was satisfied that the loan was taken by the accused and towards its repayment the cheque in question was issued, which was bounced for “insufficient funds”, it (trial court) has erred in law in acquitting the accused only on the ground that the actual service of notice on the respondent is not proved. In this connection, the relevant portion in the impugned judgment was read out and the evidence in the lower court record was referred, showing that it was fully proved by the complainant that the required notice was sent to the accused by the registered post before filing the criminal complaint.

7) On the other hand, learned counsel for the accused contended that the trial court has rightly acquitted the accused Shivender Bahadur Singh as the complainant did not prove the fact that the accused refused to accept the notice. In this connection, it is further argued that the complainant should have got examined the postman to prove the fact that the accused actually refused to accept the notice sent to him by the registered post.

8) In the case of ***C.C. Alavi Haji Vs. Palapetty Muhammed (2007) 6 SCC 555***, it has been held by the Apex Court that even if there is no actual service of notice on the accused sent under Section 138 (b) of Negotiable Instruments

Act, 1881, if the accused fails to pay the amount mentioned in the cheque within 15 days of receiving the summons, he cannot claim that there was no personal service on him of the notice. Similarly, view was taken by the Apex Court in ***K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another (1999) 7 SCC 510***, in para 21 of said judgment where it has been observed that a payee can send the notice for doing his part of giving the notice, but once it is dispatched his part is over and the next depends on what the sendee does.

9) It is relevant to mention here that Clause (b) of Section 138 of Negotiable Instruments Act, 1881, only requires giving of a notice, in writing, to make a demand within 30 days of receipt of information from the Bank, regarding the return of the cheque as unpaid. Interpreting the said provision the Apex Court in ***V. Raja Kumari Vs. P. Subbarama Naidu and another (2004) 8SCC 774***, has clarified that “giving notice” in the context is not the same as “receipt of the notice”.

10) In view of the above judgments of the Apex Court, this Court is of the view that the trial court has erred in law in acquitting the accused, merely on the ground that the actual service of notice on the accused was not proved by producing the Postman who could have stated that the accused refused to accept the notice. As far as, the relation between the complainant and the accused, and taking friendly loan by the accused Shivender Bahadur Singh from the complainant

Janardan Singh, and issuance of impugned cheque dated 31.03.2000, for an amount of Rs. 50,000/- is concerned, the same is amply proved by PW1 Janardan Singh. PW2 Ram Dev Mishra, Branch Manager, State Bank of India, Pantnagar Branch, has proved that with the said cheque No. RUDRAP/SB/96/AK No. 305895 of Rs. 50,000/- was sent to the Bank of Baroda on 17.04.2000. It was received back with a slip from the said bank without the payment. The information dated 06.05.2000, from the Bank of Baroda, regarding dishonoring of the cheque, on account of 'insufficient funds' is proved on the record, which is received by the complainant with letter dated 16.05.2000, issued by State Bank of India, Pantnagar Branch, which is also the part of the lower court record, proved by the witness.

11) For the reasons as discussed above, and after re-appreciating the evidence on record, this Court is of the view that the appeal deserves to be allowed.

12) Accordingly, the appeal is allowed. The impugned judgment and order dated 15.07.2006, passed by 1st Additional Civil Judge (Junior Division)/Judicial Magistrate, Udham Singh Nagar, in Criminal Complaint Case No. 723 of 2006, acquitting the accused Shivender Bahadur Singh is hereby set aside. Respondent No.2 / accused Shivender Bahadur Singh is convicted under Section 138 of Negotiable Instruments Act, 1881. After hearing the parties on sentence, accused/respondent No.2 Shivender Bahadur Singh is

sentenced to pay fine of Rs. One lakh. Out of the fine of Rs. 1 lakh/- after the same is deposited in the Court, Rs. 75,000/- shall be paid to the complainant as compensation. In default of payment of fine the respondent No.2 Shivender Bahadur Singh shall undergo three months of simple imprisonment.

(Prafulla C. Pant, J.)

28.02.2013
JM