

(2008) 03 P&amp;H CK 0065

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Avtar Singh

APPELLANT

Vs

Canara Bank

RESPONDENT

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**Date of Decision:** March 18, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 239, 482
- Negotiable Instruments Act, 1881 (NI) - Section 138, 5, 6, 9

**Citation:** (2008) 4 CivCC 435 : (2008) 152 PLR 452 : (2008) 4 RCR(Civil) 300 : (2008) 4 RCR(Criminal) 275**Hon'ble Judges:** Harbans Lal, J**Bench:** Single Bench**Final Decision:** Dismissed

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**Judgement**

Harbans Lal, J.

This petition has been moved u/s 482 of the Code of Criminal Procedure Code (for short, "the Code") by Avtar Singh for quashing the complaint, Annexure P-1 dated 28.1.2006 filed by the respondent-bank against the petitioner for offence u/s 138 of the Negotiable Instruments Act (for brevity, "the Act"), the summoning order dated 28.1.2006, Annexure P-2 and the order dated 11.8.2007, Annexure P-3, whereby the learned Judicial Magistrate, 1st Class has dismissed the application of the petitioner u/s 239 of the Code.

2. The brief facts are that the petitioner is not the borrower from the respondent-bank. The borrower is M/s Raja Arjun and Company (hereinafter to be referred as the "firm") which has availed the credit facility to the tune of Rs. 50 Lacs in the name of the firm. The petitioner was the guarantor of this firm. He issued a cheque No. 814906 dated 29.11.2005 for a sum of Rs. 1.5 Lacs drawn on the Indian Overseas Bank, Air Force Station E/C, Amritsar Cantonment in favour of the firm. The petitioner and the firm had inter se some financial transactions which has no

relation with the bank. Due to the financial transactions/dealings between the petitioner and the firm, he issued the above said cheque in favor of the firm. Unfortunately, the same was dishonoured by the banker of the petitioner vide Memo dated 1.12.2005 with the remarks, "exceeds arrangements." The respondent-bank got hold of the above said cheque as well as the Memo and filed the complaint. The learned Magistrate issued the summoning order on the basis of the above said baseless complaint. The petitioner neither owned the bank any thing nor he borrowed money from the bank nor he issued the cheque in favour of the bank. The petitioner filed an application u/s 239 of the Code for discharge. The same was dismissed. The above mentioned cheque was not for payment of any amount to the complainant-bank, which is not the payee. The payee or holder in due course of the cheque would be the firm. As such, the complaint lodged by the respondent against the present petitioner is not maintainable u/s 138 ibid. Consequently, the complaint as well as further proceedings arising therefrom are liable to be quashed.

3. I have heard the learned Counsel for the parties besides perusing the record with due care and circumspection.

Mr. S.S. Majithia, Advocate, counsel for the petitioner canvassed at the bar that the cheque on the basis of which the bank has lodged the complaint, was issued by the petitioner in favour of the firm and not in favour of the complainant-bank and that being so, by no stretch of speculation, the petitioner can be deemed to be a borrower of the bank. As such, in view of the provisions of Section 138 ibid, the bank is not competent to institute the complaint against the petitioner.

4. To tide over these submissions, Mr. K.S. Rekhi, Advocate for the respondent-bank, contended that Avtar Singh accused, in order to discharge his liability towards the complainant bank in part, has issued this cheque in favour of the borrower firm and handed over the same for crediting the cheque in the Cash Credit Facility account of the firm and, thus, prima facie, no case is made out for quashing the complaint as well as the subsequent proceedings.

I have well considered the rival contentions.

5. Annexure P-4 is the true copy of the cheque dated 29.11.2005 which is in favour of M/s Raja Arjun and Company or the bearer, Mr. T.R. Bawa, Senior Manager, Canara Bank, Dalhousie Road, Pathankot, has put on record his affidavit, solemnly affirming therein that Avtar Singh (referring to the petitioner) being the guarantor in the account of M/s Raja Arjun and Company, has given me the cheque bearing No. 814906 dated 29.11.2005 for Rs. 1.5 lacs drawn on the Indian Overseas Bank, Air Force Station, E/C, Amritsar Cantonment, in order to discharge his liability towards the complainant bank in part for crediting the same in the Cash Credit Facility account of borrower firm and also assured that the said cheque is good for payment and the same will be encashed on its presentation through the bank; that as per assurance given by Avtar Singh, the said cheque was deposited by me in the account

of the firm on 1.12.2005 and 6.12.2005 but the same was dishonoured by the banker of Avtar Singh with the remarks, "exceeds arrangements"; that Avtar Singh has personally handed over the aforesaid cheque to me with the instructions to credit the same in the aforesaid account of borrower firm; that beside the cheque in question, another cheque of Rs. 1 Lac was given by Avtar Singh being guarantor of M/s Raja Arjun and Company, which was honoured and the amount of the same was duly credited in the account of borrower firm on 28.11.2005.

The relevant provisions of the Act required to be considered for the present dispute read as under:

Section 5:

Bill of exchange.- A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument....

Section 6:

"Cheque".- A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Section 9:

"Holder in due course".- "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee thereof, if (payable to order), before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

Section 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....

6. A meticulous perusal of Annexure P-4 would reveal that the disputed cheque was in the name of M/s Raja Arjun and Company or the Bearer. Therein, it has been mentioned "Pay M/s Raja Arjun and Company or bearer, Rs. 1.50 lacs only." This leaves no room for doubt that the cheque was bear also as the words, "or bearer" were not cut by the petitioner. As envisaged by Section 5 of the Act, Bill of Exchange is an instrument in writing signed by the maker directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of

the instrument. It is own version of the petitioner that M/s Raja Arjun and Company had availed the credit facility to the tune of Rs. 50 lacs in the name of the firm. He (petitioner) was the guarantor of the said firm. As noted supra, Mr. T.R. Bawa, Senior Manager, in his affidavit, has solemnly affirmed that Avtar Singh being the guarantor in the account of M/s Raja Arjun and Company, had given him the disputed cheque in order to discharge his liability towards the complainant bank in part for crediting the same in the Cash Credit Facility of the borrower firm. More to the point, besides the cheque in question, another cheque of Rs. 1,00,000/- given earlier by Avtar Singh, being guarantor of M/s Raja Arjun and Company was honoured and the amount of the same was duly credited in the account of the borrower firm on 28.11.2005. In view of the provisions of Section 9 *ibid*, the above mentioned Manager on behalf of the Bank became the possessor of the cheque as the same was issued by the petitioner being a petitioner for adjustment towards the Cash Credit Facility Account of the firm. The cheque being bearer and in possession of the aforementioned Manager gives rise to the presumption in view of the afore-quoted provisions of Section 9 of the Act that the respondent-bank is a holder in due course. There may have been a feeling in the mind of the petitioner that in case he handed over this cheque to the above mentioned firm, the same may get it encashed and appropriate its proceeds to its personal use instead of depositing the same in the bank towards the discharge of Cash Credit Facility liability. There may be another reason for making mention of the name of the firm in the cheque by the petitioner that later on, he may recover the same from the firm.

7. In *Re: N. Sivalingam and Anr. v. A.V. Chandraiya* 1996 Comp Cas 167, it was held as under:

The respondent herein preferred a complaint u/s 138 of the Negotiable Instruments Act, 1881, against one Diwan Mohideen and the petitioners herein in C.C. No. 338 of 1990 pending on the file of Judicial Magistrate-I, Salem, alleging that two post-dated cheques, one dated April 22, 1990, for Rs. 4,800/- and the other dated April 28, 1990, for Rs. 5,000/- were drawn by the present petitioners on the South Indian Bank Limited, Kanchipuram Branch, in favour of Diwan Mohideen. The latter discounted them with the respondent/complainant and received a sum of Rs. 9,214/- after deducting all charges on March 12, 1990. When the complainant presented the cheques for payment, they were dishonoured on September 21, 1990, with the endorsements "refer to drawer" and "exceeds arrangement" respectively.

8. It was held that there is nothing in the wording of the Section 138 of the Act to hold that only the payee named in the cheque can maintain the account.

9. In *re: Mahesh Goyal v. S.K. Sharma* 1997 (2) R.C.R. 301 (P&H), self drawn cheque was given to a person in discharge of legal liability. The cheque was dishonoured. It was held that the possessor of a self drawn cheque will come within the expression, "Holder in due course" and the drawer of cheque is guilty of the offence u/s 138 of the Act.

10. As a sequel of the preceding discussion, it is held that no case is made out for quashing the complaint, Annexure P-1, the summoning order, Annexure P-2, the order dated 11.8.2007, Annexure P-3 and the subsequent proceedings arising therefrom.

11. Hence, this petition is dismissed.