

(2010) 10 P&H CK 0275

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Miscellaneous No. M-30577 of 2010

Mrs. Renuka Walia

APPELLANT

Vs

Rakesh Kumar and Another

RESPONDENT

Date of Decision: Oct. 14, 2010**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 482
- Negotiable Instruments Act, 1881 (NI) - Section 138

Hon'ble Judges: S.S. Saron, J**Bench:** Single Bench

Judgement

S.S. Saron, J.

This petition has been filed u/s 482 of the Code of Criminal Procedure ("CrPC" - for short) seeking quashing of complaint No. 449/2 dated 28.2.2009 (Annexure P2) filed by Rakesh Kumar (respondent No. 1) against the petitioner u/s 138 of the Negotiable Instruments Act, 1881 ("NI Act" -for short) and for quashing the summoning order dated 14.3.2009 (Annexure P4) whereby the petitioner has been summoned by the court of learned Judicial Magistrate Ist Class, Panchkula.

2. Respondent No. 1 filed the impugned complaint (Annexure P2) against the petitioner alleging that the petitioner represented to him that she is the owner in possession of flat No. 210 GH-34, 2nd Floor, MDC, Panchkula and that she wanted to sell the said flat. The complainant/respondent No. 1 showed his willingness to purchase the same. A receipt-cum-agreement dated 15.8.2008 in favour of the complainant/respondent No. 1 was executed. The complainant/respondent No. 1 paid a sum of Rs. 5,50,000/- as earnest money to the petitioner against the entire sale consideration of Rs. 25,50,000/-. The petitioner received the same in the presence of marginal witnesses. The last date for execution and registration of the sale deed was fixed as 31.12.2008. It was agreed that the petitioner would obtain No-Dues Certificate and No-Objection Certificate for execution of the sale deed in favour of the complainant/respondent No. 1 and in case she (petitioner) fails to

perform her part of the contract, then she would be liable to pay double of the earnest money to the complainant/respondent No. 1. It is alleged by the complainant/respondent No. 1 that the petitioner failed to perform her part of the contract. As such she was liable to refund double of the earnest money. The complainant/ respondent No. 1 requested the petitioner to execute and register the sale deed in respect of the property or to refund double of the earnest money as agreed by the petitioner in terms of the receipt-cum-agreement to sell. In order to discharge her liability, the petitioner issued an account payee cheque No. 077788 dated 20.1.2009 for an amount of Rs. 11 Lacs drawn on the Bank of Punjab Limited, DC Model School, Sector-7, Panchkula in favour of the complainant/respondent No. 1 with the assurance that the cheque would be encashed on its presentation to the bank. The complainant/respondent No. 1 as per instructions of the petitioner presented the cheque for encashment to his banker i.e. Centurion Bank of Punjab Limited, Panchkula. The said cheque was, however, returned back unpaid and dishonoured vide memo dated 24.1.2009 with the remarks of "insufficient funds". Information regarding this was received by the complainant/respondent No. 1 from his bankers. The complainant/respondent No. 1 contacted the petitioner and informed her about the dishonour of the cheque but she paid no heed to the requests of the complainant. Ultimately, the complainant/respondent No. 1 served a legal notice dated 5.2.2009 (Annexure P3) which was posted on 7.2.2009 under Registered AD and under postal certificate. The legal notice has been duly served upon the petitioner. However, in spite of the notice, the petitioner failed to make the payment of loan amount either within a period of 15 days from the date of receipt of the notice or till date. Accordingly, the complaint was filed.

3. The learned Judicial Magistrate Ist Class, Panchkula in terms of order dated 14.3.2009 (Annexure P4) has summoned the petitioner. The said complaint (Annexure P2) and the summoning order dated 14.3.2009 (Annexure P4) are assailed by the petitioner.

4. Learned Counsel for the petitioner has contended that the cheque dated 20.1.2009 bearing No. 077788 drawn on Bank of Punjab does not bear the signatures of the petitioner and is not from the account of the petitioner. In fact the said cheque is drawn on the account of her husband Sh. Deepak Walia. In this regard a reference has been made to the certificate dated 7.10.2010 (Annexure P10) issued by the HDFC Bank Limited, SCO 409, Sector-8, Panchkula (Haryana) wherein it has been mentioned that the account number which is mentioned in the cheque in question is that of Sh. Deepak Walia i.e. husband of the petitioner. The said account it is certified by the HDFC Bank was opened on 15.7.2004 and was closed on 29.11.2009. Therefore, it is submitted that the cheque having been issued of an account which is not that of the petitioner, the complaint (Annexure-P.2) would not be maintainable. It is further contended that the legal notice (Annexure P3) has been issued at the address of the petitioner i.e. Flat No. 210 GH-34, 2nd Floor, MDC, Panchkula. However, there is no such flat in existence which is even the admitted

petition between the petitioner and respondent No. 1. In this regard, it is submitted that the petitioner had filed a complaint u/s 156(3) Code of Criminal Procedure for the false complaint lodged by respondent No. 1. The said complaint was referred for inquiry by the learned Magistrate to the Police. In proceedings before the Police, respondent No. 1 made his statement (Annexure P6) in which it is accepted that the flat of such number did not exist in the Society". Therefore, it is submitted that the petitioner filed an application (Annexure P8) for staying further proceedings before the learned trial Court in which it was pleaded that there was no such flat in existence for which the petitioner paid the above said huge cash amount and the said averment has not been denied by respondent No. 1 in his reply (Annexure P9). Therefore, it is submitted that the legal notice dated 5.2.2009 (Annexure P3) in terms of Section 138 of NI Act cannot be said to have been served.

5. During the course of hearing, it is not disputed by the learned Counsel for the petitioner that these aspects are to be established by leading evidence. However, it is the stand of the learned Counsel that the said position evidently shows that the complaint (Annexure-P.2) that has been filed is baseless and the petitioner would yet have to undergo the travails of trial. Therefore, it is prayed that the petitioner would establish her case on the aforesaid two aspects and other defences as are open to her. However, the petitioner being a lady and also a Municipal Councillor, her presence for each date of hearing during the trial of the case be dispensed with.

6. After giving my thoughtful consideration to the matter, it may be noticed that the effect of the cheque on the basis of which the complaint (Annexure-P.2) has been filed being not issued from the account of the petitioner but from the account of her husband, if at all the same is the correct position, would be required to be considered by the learned trial Court. It would also have to be ascertained whether the said cheque, in any case, bears the signatures of the petitioner and if so its effect. Besides, the documents which have been referred to by the learned Counsel for the petitioner are to be considered and gone into by the learned trial Court in case they are proved and set up before her. This Court in exercise of its inherent jurisdiction u/s 482 Code of Criminal Procedure is not to carry out a parallel proceedings or embark upon an inquiry to ascertain whether or not the cheque in question has been issued from the account of the petitioner and, in any case, what would be its effect. Moreover, it is to be considered by leading evidence whether an offence as alleged is made out or not. The certificate dated 07.10.2010 (Annexure P10) issued by the HDFC Bank would also have to be proved and exhibited on record before the learned trial Court. The same is not such a document which is per se admissible in evidence. Besides, even the legal notice (Annexure P3) which the petitioner states was not received by her would have to be considered by the learned trial Court after evidence is led by the parties and after examining the postal cover and AD receipts etc.

7. In the circumstances, it would be just and expedient that the petitioner raises her contentions as raised in this petition before the learned trial Court itself. However, in the facts and circumstances of the case, it would be just and expedient that during the trial of the case, the personal appearance of the petitioner on each date of hearing is dispensed with. This, however, would be subject to certain conditions.

8. Accordingly, the Crl. Misc. petition is dismissed. However, during the proceedings of the case before the learned trial Magistrate, the personal appearance of the petitioner shall remain dispensed with on each date of hearing which shall be subject to the conditions that the petitioner appears before the learned trial Magistrate and furnishes an undertaking to the effect that she shall have no objection in case the evidence is recorded in her absence, she shall appear on each date of hearing through her counsel and that she shall appear on the material dates when her presence is required before the trial Court for which an intimation shall be given by the learned trial Court to her through her counsel.

9. Noting observed or stated herein shall be construed as an expression of opinion on the merits of the case between the parties and the learned trial Court shall consider the case on the basis of the evidence and material as adduced before it and uninfluenced by any observations made herein.