

IN THE COURT OF SUNIL,
JUDICIAL MAGISTRATE IST CLASS, FARIDABAD.

Complaint No. 2007 of 15.11.2013
CIS No. 10830 of 2013
Date of Instt. 15.11.2013
Date of decision: 10.08.2016

Ajay S/o Sh. Vijay
R/o 2C-1, NIT Faridabad

.....Complainant

VERSUS

Smt. Kiran Narula w/o Sh. Satish Kumar
R/o 2A/96/B, NIT Faridabad

....Accused

P.S. Kotwali Faridabad

**Criminal Complaint under Section 138 of Negotiable
Instruments Act**

SUMMARY TRIAL

Present: Complainant in person with counsel Sh. Harjeet Singh, Adv.
Accused on bail with counsel Smt. Ranjana Sharma, Adv.

JUDGMENT:

The present complaint has been filed by the complainant stating therein that he was in need of money so he approached Punjab National Bank, NIT, Faridabad for a bank loan in the month of September 2013 where accused is an employee. It is alleged that accused promised him to get the loan sanctioned but she demanded Rs. 60,000/- from complainant as friendly lona for her personal use. It is alleged that at that time accused has assured that she will repay the same within a few days. It is alleged that complainant advanced the loan of Rs.

80,000/- to accused thereafter, when complainant demanded his money back, then accused after admitting her legal liability for repayment of the amount borrowed by her, issued a cheque bearing no. **609556** dated **08.10.2013** for **Rs.60,000/-** drawn on “Punjab National Bank, NIT, Faridabad” in favour of complainant. When complainant presented the said cheque for encashment through his banker, the same was returned back as unpaid vide return memo dated 10.10.2013 with the remarks “Payment Stopped by Drawer”. Thereafter, legal notice dated **19.10.2013** was sent to accused calling upon her to make the payment but as per complainant no payment was made. Hence, the present complaint has been filed.

2. In his preliminary evidence, complainant himself stepped into the witness box as CW-1, who tendered his duly sworn affidavit as Ex.CW1/A and complainant has also examined Sh. Pankaj Gupta as CW-2 and relied upon the following documents:-

- | | | |
|-------------------|----------|---|
| Ex.C1 | : | Original cheque bearing no.609555 |
| Ex.C2 | : | Return memo |
| Ex.C3 | : | Legal notice dt.19.10.2013 |
| Ex.C4 | : | Postal receipt |
| Ex.C5 | : | Regd. Envelope |
| Ex. CW-2/A | : | letter dt. 16.03.2013 written to bank for stopping the payment of cheque |
| Ex. CW-2/B | : | Statement of account |

3. Upon the presentation of complaint, notice was issued to the accused. Accused put her appearance alongwith her counsel and secured her bail.

4. Thereafter, notice of accusation was served upon the accused for having committed an offence under Section 138 of Negotiable Instrument Act, to which she pleaded not guilty and claimed trial. Thereafter, the case was adjourned for CWs.

5. Statement of accused under Section 313 Cr.P.c. recorded where in she was apprised of all the incrementing evidence appearing against her. She denied the same and pleaded false implication and claimed innocence. Thereafter, case was fixed for evidence of accused.

6. In defence accused examined Syed Faisal Hooda, handwriting & finger print expert as DW-1 and accused herself appeared as DW-2 and relied upon documents D-1 & D-2 report of handwriting expert and Ex. R-1 Specimen admitted Signatures of accused and Ex. R-2 certificate issued by Punjab National Bank, Ex. DW-2/A DDR Entry and thereafter, defence evidence was closed by court order.

7. Before parting with the judgment, this court wants to mention here that there initially two complaints titled as “Ajay Vs. Smt. Kiran” i.e. present complaint and another complaint titled as “Roni Vs. Smt. Kiran” bearing no. 2006 of 2013 were filed before this court on the same date. The counsel for complainant, who has filed both the complaints is also the same and due to oversightness of ld. Counsel of complainant, the cheque issued in favour of Roni was filed alongwith the complaint filed on behalf of Ajay and the cheque issued in favour of Ajay was filed alongwith the complaint filed on behalf of Roni and all the subsequent proceedings initiated after the filing of the present

complaints were also initiated on the basis of respective cheques filed alongwith respective complaints.

8. Now in the present case, Learned counsel for the complainant Ajay has argued that from the evidence brought on record, complainant has been able to prove his case successfully. He contended that all the ingredients of Section 138 of NI Act have been duly complied with. He argued that complainant had paid an amount of Rs.60,000/- to accused as friendly loan and for repayment of amount so advanced by complainant, the cheque was issued by accused and the same was dishonoured. Ld. Counsel for complainant further submitted that due to inadvertence, the cheque issued in favour of Ajay was filed in the complaint titled as "Roni Vs. Kiran" complaint bearing no.2006 of 2013. He argued that the defence taken by accused that she never borrowed any alleged amount of Rs. 60,000/- from complainant and never issued the cheque in favour of complainant, is totally vague and baseless defence. No such evidence has been led on behalf of accused. On the other hand, complainant by leading cogent and convincing evidence has been able to prove the guilt of the accused. He further submitted that accused is just raising the false pleas that her cheques were misplaced and the one of them has been misused by complainant. In this regard also no cogent evidence has been led on behalf of accused. He further argued that accused even failed to reply the legal notice and adverse inference is liable to be drawn against her. The rules of presumptions lies in favour of complainant and accused miserably failed to rebut the presumptions drawn in favour of complainant. With these submissions, he prayed that

accused be held guilty.

9. On the other side, controverting the allegations of complainant, learned Counsel for the accused has contended that complainant miserably failed to prove his case against the accused. She argued that the cheque in question was never issued by accused in discharge of any legal debt or liability. Accused never borrowed any alleged loan from complainant and never issued any cheque in favour of complainant. Accused is not liable to pay the cheque amount. False complaint upon misleading facts has been filed by the complainant. Ld. Counsel for accused further submitted that in fact certain cheques of accused were misplaced and complainant some how managed to get one of them and misused the same. Ld. Counsel for accused further submitted that the cheque even does not bears the signatures of accused and accused by examining Syad Faisal Hooda, handwriting and finger print expert as DW-1, has been able to prove that the cheque does not bears her signatures. She further submitted that accused has already instructed her banker for stopping the payment of the cheque much before the date of presentation of the cheque. She further argued that even the complainant was not having sufficient financial capacity for advancing such a huge amount to accused as he himself has approached the accused for a bank loan and therefore how it can be presumed that he advanced the loan to accused. Accused was not even known to complainant earlier and there was no need for accused to borrow a loan from complainant. No document pertaining to loan transaction in question has been led on behalf of complainant and complaint is liable to

be dismissed on these grounds. She further submitted that the legal notice was never received by accused as the same was sent upon the residential address of accused and accused being a bank employee used to remain at the bank from 9.00 a.m. to 5.00 p.m. and therefore, the question of refusal of legal notice on part of accused does not arise at all. The report of refusal has been procured by complainant in connivance with postal authorities. Accused has been able to raise a probable defence in her favour and successfully rebutted the presumptions drawn in favour of complainant. With these submissions, she prayed that accused be acquitted and complaint be dismissed.

10. I have heard the learned counsel for both the sides at length and carefully gone through the material placed on record.

11. For the offence under section 138 of the Negotiable Instruments Act, 1881 to be established, following ingredients must be duly established:

- i) a person must have drawn a cheque;
- ii) such cheque must have been drawn on an account maintained by such person with a bank;
- iii) such cheque must have been drawn 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;
- iv) such 'debt or other liability' must be legally enforceable debt or other liability;
- v) that cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- vi) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;
- vii) the payee or the holder in due course of the cheque 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 30 days of the receipt of information by him from the bank regarding the

return of the cheque as unpaid;

viii) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

12. From the evidence placed on record, it is clear that the cheque Ex.C1 bears the date 08.10.2013 and the same was dishonoured due to the reason "Payment stopped by drawer" vide bank memo Ex.C2. Thereafter, legal notice dated 19.10.2013 Ex.C3 was sent by the complainant to the accused calling upon him to pay the cheque amount within 15 days of the receipt of the same but the accused has failed to make the payment despite receipt of notice. The present complaint has been filed within time.

13. Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of endorsements, (iv) as to appropriate stamps and (vii) as to holder being a holder in due course.

14. Section 118 of the Act inter-alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability. Meaning thereby that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant

discharges the burden to prove that the instrument was executed by the accused, the rules presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

15. To rebut the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.

16. After hearing the ld. Counsel for both the parties and after taking into consideration the entire facts, circumstances, oral and documentary evidence available on record, this court is of the considered view that complainant miserably failed in proving his case against accused and accused has been able to rebut the presumptions drawn under Section 139 of NI Act in favour of complainant. For proving his case complainant has examined himself as CW-1 and tendered his duly sworn affidavit Ex. CW1/A, in which he reiterated the entire assertion as made in the complaint. Complainant in support of his case has also examined Sh. Pankaj Gupta, Bank officer as CW-2. It is the case of complainant that he has provided a friendly loan to accused and for repayment of the loan so advanced, the cheque was issued by accused and the same was dishonoured.

17. On the other side, accused has taken specific defence that no friendly loan was ever borrowed by her from complainant and cheque was never issued by her in favour of complainant in discharge of any legal debt and liability. Accused has taken the stand that her certain cheques were misplaced and complainant somehow managed to get the same and misused the same.

18. To corroborate the version of accused, ld. Counsel for accused draws the attention of court towards the testimonies of CW-2, who was a bank official and was summoned on behalf of complainant. CW-2 Pankaj Gupta has brought on record Ex. R-1, the specimen signatures of accused, which are available with the bank. Ex. CW-2/A letter written to bank, which was written by accused on 16.03.2013 for stopping the payment of certain cheques. The document Ex. CW-2/A goes to show that accused has stopped the payment of the cheque alleged to be issued in the favour of complainant much before the date of presentation of the cheque. The cheque was presented for encashment on 08.10.2013 and the payment was stopped on 16.03.2013 nearly eight months before the presentation of cheque. Further, accused has taken the plea that the cheque does not bears her signatures and this fact finds corroboration from the testimony of DW-1 handwriting and finger expert, who has submitted his detailed report after analysing the disputed and admitted signatures of accused. The witness DW-1 has compared the disputed signatures as present upon cheque alongwith the admitted signatures of accused as present upon document i.e. Ex. R-1 produced by CW-2, i.e. specimen signature of accused available with the bank, where

accused maintains her account. DW-1 has specifically opined that after analysing the disputed and admitted signatures, the disputed signatures does not appears to be marked by accused. These facts makes the version of accused probable and believable that she never issued the cheque in favour of complainant. Though the report of a private handwriting expert is of not much relevance as it is generally seen that a private handwriting expert used to submit his report in favour of the parties by whom he is engaged. But in the present case, the situation is different. He has compared the disputed signatures alongwith the signatures of accused available in the bank. Therefore, the report of a private handwriting expert becomes relevant as the same is coupled with other certain other circumstances of the case as discussed below. Further, it is also pertinent to note here that the specimen signatures of accused as present on Ex. R-1 does not resembles with signatures of accused as the affixed upon the cheque Ex. C-1 and the same can be perused by the naked eyes. Section 73 of Evidence Act gives wide power to the court to compare and examine any disputed and admitted signatures or handwriting. Though the court cannot act like an expert but can act like a reasonable and prudent person. A bare perusal of the disputed and admitted signatures reveals that the same does not resembles with each other. Therefore, it can easily be presumed that the cheque was never issued by accused nor she signed the same.

19. Further, we came to the other aspect of the case, it has been alleged on behalf of complainant that he provided a friendly loan to accused. This fact is also improbable to believe. In complaint it has been

alleged by complainant that he went to the bank of accused for borrowing a loan as he was in the need of money. There he met accused and accused demanded a friendly loan from him and he advanced the same to accused. It is not alleged by complainant that he was known to accused earlier neither there is any evidence on the court file to show any prior relation or prior connivance of both the parties. No witness to the alleged loan transaction has been examined on behalf of complainant. As complainant has not only failed to prove on record the alleged loan transaction but also failed to prove that the cheque was issued in discharge of legal debt and liability. There is no corroborating evidence to substantiate the allegations of the complainant that accused borrowed any loan from him. Therefore, it cannot be presumed that a person who himself is in the need of money, would advance a loan to a person, to whom he has never met earlier. Surprisingly, neither any document nor any receipt was executed at the time when the loan was advanced by complainant. Such type of conduct is not expected from a reasonable and prudent person.

20. It is not probable to believe that complainant, who runs a gym, would advance such an amount to another without getting any receipt from the person to whom the money was advanced or without getting the loan transaction to be reduced into any form of writing. By no means an amount of Rs. 60,000/- can be said a small amount. No witness to the alleged loan transaction has been examined on behalf of complainant. Our Hon'ble Apex Court has held in case titled as ***Vijay Vs. Laxman & another 2013(1) RCR (Criminal) 1028 SC*** that

“where the loan transaction is not proved, conviction under Section 138 of NI Act is liable to be set aside. In this case also complainant fails to show that he was having such a huge amount for giving the same to complainant.” Similarly, in *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde 2008(5) BCR 470* our Hon'ble Apex Court held that “Section 139 raises no presumption in regard to existence of debt and 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.” Further, it has been held by our Hon'ble High Court in *Sekhon and Sekhon Finance Ltd.(M/s.) V. Rani 2014(1) NIJ 296* that “mere admission of signature is not admission where the accused contend misuse of the blank signed cheque and onus to prove that there in fact existed a legally enforceable debt was upon complainant firm and none else. Complainant failed to prove any documents of loan agreement he made entire story shady and unworthy of credence.” The defence of accused that her certain cheques were misplaced and the cheque in question is also one of them and the cheque has been misused by complainant cannot be said an after thought as the same is corroborated with the document Ex. CW-2/A (as discussed above). Therefore, this Court is of the view that accused has been able to raise a probable defence in her favour.

21. It is also pertinent to note here that the accused in the present case is bank manager and is earning a handsome salary. Therefore, it cannot be presumed that she would borrow a loan of such

an amount from complainant. Complainant fails to establish the circumstances warranting the need of accused for borrowing money from him. Presumption stood rebutted or not must be determined on the basis of evidence and circumstances of particular case. Where the chance of false implication cannot be ruled out the background, fact and the conduct of the parties together with their legal requirements are required to be taken into consideration. Courts must be on guard to see that merely on the application of presumption as contemplated u/s 139 NI Act, the same may not lead to injustice or mistaken conviction. Now, even if look one other aspect of the transaction i.e. let us presume that the loan was provided to accused as she has assured complainant that she would sanction a loan in favour of complainant, in that situation the loan becomes illegal gratification and the same does not come under the purview of Section 138 of NI Act. As one of the necessary and foremost conditions of Section 138 NI Act is that the debt for the discharge of which the cheque is alleged to be issued must be legally enforceable debt. Money granted for the purpose of illegal gratification cannot be legally recovered. Though it has not been so alleged by complainant.

22. The initial burden in a particular situation of proving that the cheque was never issued in discharge of legal debt and liability always remains upon accused and once accused has been able to show or has been able to make his version believable that his cheque has been misused, the burden again shifts upon complainant to prove his case beyond all reasonable doubts. Like in the present case also, when accused is specifically alleging that she never issued the cheque and

never borrowed any amount from complainant then the burden shifts upon complainant to prove the guilt of accused beyond all reasonable doubts.

23. Presumption under Section 138 & 139 are rebuttable presumption and same are rebuttable on preponderance of probabilities. It is a settled principle of law that once the defence is able to rebut the presumption under the Negotiable Instruments Act, it is for the complainant to prove the case beyond all reasonable doubts. The responsibility of the defence is over by creating a reasonable doubt in the prosecution case and the defence is not required to prove its case beyond all reasonable doubts. Once a reasonable doubt in the prosecution case is created by the defence and the prosecution fails to prove its case beyond all reasonable doubts, the accused becomes entitled to the benefit of doubt and to be acquitted of the acquisition.

24. Existence of legally recoverable debt is not a matter of presumption under Section 139 of NI Act. It merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of any debt or other liability. Certain other principles of criminal jurisprudence also to be kept in mind while deciding any complaint under Section 138 of NI Act. The basic principle in criminal law is that the guilt of accused must be proved beyond reasonable doubt and if there is a slightest doubt about the commission of an offence then the benefit has to accrue to him.

25. Therefore, in view of the abovesaid reasons recorded above, this Court is of the considered view that complainant miserably failed in

proving his case and the cheque was never issued by the accused in discharge of any legal debt and liability. Consequently, the complaint of complainant fails and the same is hereby dismissed. The accused present in the Court is hereby acquitted of all the charges levelled against her. She is directed to furnish fresh bail bond in compliance of provision of Section 437-A of Cr.P.C. File, after due compliance, be consigned to the record room.

Announced in open court.
Dated 10.08.2016.

(Sunil)
Judl. Magistrate 1st Class,
Faridabad.

Note: This judgment contains fifteen pages and each page has been signed by me.

(Sunil)
Judl. Magistrate 1st Class,
Faridabad.10.08.2016.