IN THE COURT OF RAKESH KUMAR RAMPURI,
METROPOLITAN MAGISTRATE (NI ACT) KARKARDOOMA COURTS:
SHAHDARA, DELHI.

JUDGMENT U/S 355 Cr.PC

a.	**Serial No. of the case**	**:**	**VK-168/04**
b.	**Date of the commission of the offence :**		**16/06/2004**
c.	**Name of the complainant**		**Kusum Kapoor**
d.	**Name of accused person and his parentage: and residence**		**Arvind Kr. Walia, S/o Sh. B. D. Walia, R/o J-12/84, Top Floor, Rajouri Garden, Delhi.**
e.	**Offence complained of**	**:**	**Dishonoring of cheque for Account closed.**
f.	**Plea of the accused and his examination (if any):**		**Not guilty Because he has repaid entire loan amount to the complainant and all dispute had been settled vide written agreement dt. 25.12.2003.**
g.	**Final Order**	**:**	**Held not guilty. Acquitted.**
h.	**Order reserved on**	**:**	**14.01.2013.**
i.	**Order pronounced on**	**:**	**04.02.2013**

Brief reasons for decision:-

1. The necessary facts for disposal of present complaint under section 138 of Negotiable Instrument Act 1881 (in short NI Act) in nut shell are that complainant and accused had cordial relationship between them and considering the financial problem of accused complainant had given a sum of Rs. 1,55,000/- through cheque bearing number 284965 as friendly loan. It is also case of complainant that accused had promised to return loan amount at once as soon as the financial status of accused improved alongwith interest at the rate of 24 % per annum. It is also alleged by the complainant that accused sold his house of RU-297, Pitam Pura, Delhi and did not disclose his new address to the complainant with malafide intention. It is also stated by the complainant that on 05.04.2004 complainant managed to locate the address of accused and asked for payment of loan with interest since March 1999. On this accused had allegedly issued a post dated Cheque bearing number 179974 for a sum of Rs. 1,55,000/- dt. 26.04.2004 drawn on UCO Bank, Kirti Nagar, New Delhi, Ex. CW1/B in favour of complainant (hereinafter referred to as cheques in question). It is also case of complainant that cheque in question had returned unpaid vide returning memo Ex. CW1/C dt. 19.05.2004 with remarks “Account closed”. It is also stated by the complainant that accused did not pay cheque amount despite service of legal demand notice Ex. CW1/D dt. 01.06.2004 within stipulated time. Hence, aggrieved from the aforesaid conduct of accused, complainant filed the present complaint case u/s 138 of NI Act on 01.07.2004.

2. Notices of accusation u/s 251 Cr.P.C were served on accused persons on 13.12.2008 to which he pleaded not guilty and claim trial. Complainant (CW1) was subjected to extensive cross examination by the counsel for accused. Explanation of accused qua incriminating evidence u/s 313 Cr.P.C read with 281 Cr.P.C was also recorded on 14.02.2011. Accused (DW1) examined and cross examined u/s 315 Cr.P.C. DW2 Sayed Faisal Hudda, (handwriting expert) was also examined and cross examined. Both counsel for parties made oral argument at length on 14.01.2013 and counsel for accused filed written argument on record.

3. I have given thoughtful consideration to respective submissions of both counsels and made careful perusal of entire record of this case.

4. At very outset, it may be pertinent here to take notice of presumption u/s 118 read with 139 of NI Act qua genuineness of cheque and consideration thereto in favour of complainant. Accused has to rebut initial legal presumption u/s 118 and 139 of NI Act by leading evidence with balance of probability and same can be even rebutted by exposing inherent factual contradiction or legal infirmities in the story of complainant. It is also noticeable that once accused manages to probablies his defence by creating probable doubt over the enforceability of consideration in question or its existence, it is up to the complainant to prove his case beyond all reasonable doubts. It is further

noticeable that complainant can not be allowed to prove his case by taking benefit of any lacuna in the defence of accused because his case has to stands judicial scrutiny on its own legs. In Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pharelal, (1993) 3 SCC 35 (Para.12) it has been held as herein below:-

> "Upon consideration of various judgment as noted herein above, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbably or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In

such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. **To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances, of the case, act upon the plea that it did not exist."**

5. Adverting to the facts of this case accused admitted good friendly

relationship with complainant, taking of loan in question from the complainant and issuance of cheque in question thereto. However, accused pleaded that he had repaid entire loan amount of Rs. 1,55,000/- in installments to the complainant as per agreement dt. 25.12.2003 Ex. DW1/A. Accused also claimed that as per aforesaid settlement agreement Ex. DW1/A, it was agreed between him and complainant that no further dispute would remain between them and in case any cheque is left out with anyone, same shall be treated as null and void and no party will misuse the same.

6. During cross examination complainant (CW1) stated that in 1996 accused came to her house and she had given Rs. 1,55,000/- vide a cheque in the name of Vandana Walia (wife of Arvind Walia). Complainant admitted that from the period 05.06.1996 till 25.12.2003, she several times telephoned accused and met him at Ramesh Nagar, Taj Place, Vikas Puri, Delhi. It was suggested by the counsel for accused during cross examination of complainant that complainant had transaction with accused namely Arvind Walia in year 2001, 2002 and 2003 and accused had paid some amount by cheques bearing number 166996 dt. 01.06.2001, 473117 dt. 23.07.2002 and cheques pertaining to year 2003. Here, complainant voluntarily stated during her cross examination that accused might have paid some amount to her father because he had taken loan from her father. Complainant again stated that accused might have deposited some amount in her account towards the loan amount of her father. Ld. Counsel for accused suggested during cross examination of complainant that accused

Arvind Walia never took loan from her father.

Aforesaid statement of complainant shows that complainant had some transaction with accused, even for period during 2001 to 2003 unlike her claim of ignorance about accused for same period in her complaint. Here, Ld. Counsel for accused submits that complainant did not approach the court with clean hand and she had concealed vital fact from the court. Complainant did not explain as to why she had agreed to take cheque in question of just Rs. 1,55,000/- (principal amount) in year 2004 despite claimed interest at the rate 24 % per annum in April 2004 since 1996. It is also noticeable that complainant did not produce any written agreement or pronote proving her claim of non receiving of loan in question from accused and subsequent written acknowledgment of her claim by the accused. Aforesaid conduct of complainant assumes significance in view of the fact that accused had not disclosed his new address to her with malafide intention for long time. Such conduct of complainant does not inspire the confidence of the court as a reasonable persons with average prudence in given situation. It is further note worthy that complainant had taken cheque in question bearing printed year 19__ series in year 2004 that too without any written acknowledgment from accused.

7. So far as accused no. 2 namely Vandana Walia is concerned, it is admitted position that she is not signatory of cheque in question and cheque in question has not been issued from any partnership firm or company, which she had been associated with. Accordingly, her conduct can not be held to liable u/s

138 of NI Act. Here, court is aware of legal position as to offence u/s 138 of NI Act is hyper technical offence and criminal liability under criminal law has to be construe strictly.

8. It is consistent plea of accused that he settled all outstanding disputes with complainant vide written agreement Ex. DW1/A and any cheques of any party, if left with any party was not supposed to be used in any manner. Handwriting expert (DW2) had testified that he had examined disputed and admitted signature of complainant and he is of definite opinion that disputed signature appearing at point X on agreement dt. 25.12.2003 Ex. DW1/A has been written and signed by the same person who had signed admitted signatures appearing on various documents of this case. Ld. Counsel for accused contends that plea of settlement in terms of written agreement Ex. DW1/A had been consistent from reply of accused to legal demand notice of complainant, cross examination of complainant, statement of accused u/s 313 Cr.P.C and u/s 315 Cr.P.C.. Ld. Counsel for accused also submits that accused had been honest in course of trial and admitted transaction in question and friendly relationship as claimed by complainant. The court is also aware of legal provision u/s 92 of Indian Evidence Act, which prohibits admission of oral testimony to contradict or abridge any term or condition of written agreement.

9. In view of above discussions, court is of considered opinion that accused has created reasonable doubt over the veracity of story of complainant

and complainant failed to prove her case beyond all reasonable doubts thereafter. The court is also mindful of basic tenant of criminal jurisprudence as to benefit of doubt must go in favour of accused and in case of two possible version, the version favouring the innocence of accused should be opted by the court.

10. In upshot of aforesaid discussion, I have no hesitation in ordering acquittal of accused persons for offence u/s 138 of NI Act in this case.

ANNOUNCED IN THE OPEN COURT
ON 04th Day of February, 2013

(Rakesh Kumar Rampuri)
MM, NI Act, (East)
KKD Courts, Delhi.