

IN THE COURT OF SH. D.K.JANGALA :

ADDL. RENT CONTROLLER: NORTH-WEST:ROHINI: DELHI

CC NO. 73/09/07

U/S 138 Negotiable Instrument Act.

**Sh. Mukesh Kumar
S/O Sh. Mahinder Pal,
R/O WZ-A-78, Gali No.8,
Krishna Park, Tilak Nagar,
New Delhi-18.**

..... Complainant

Versus

**Sh. Dharmender Kumar
S/O Sh. R.P. Soni,
R/O 303/10, Railway Colony,
Rani Bagh, Shakur Basti,
Delhi-34**

..... Accused

Date of Institution: 12.02.07

Date of final arguments: 23.05.12

Date of Decision: 01.06.12

JUDGEMENT:

1. The present complaint case U/S 138 of the Negotiable Instruments Act , 1881 is assigned to this Court for disposal vide order No. 145-192/01 F.3(4) MM dated 2.1.09 of Learned District Judge-I &

Sessions Judge, Delhi .

2. The complainant Sh. Mukesh Kumar filed the present complaint case for commission of the offence punishable U/S 138 of Negotiable Instrument Act, 1881 (herein after called as N I Act)against the accused. It is stated by the complainant that he is carrying out the business of fruits and vegetables merchant and accused is known to him. It is stated that the accused was passing through hard times and approached the complainant for assistance in financial terms. It is stated that the accused wanted a sum of Rs.95,000/- as loan on interest and offered to give cheque in lieu thereto. It is stated that the accused has taken the said loan of Rs.95,000/- in February, 2006 and assured to return the same by the end of 2006. It is stated that the accused has issued a cheque bearing No. 075342 dated 03.12.2006 for a sum of Rs.95,000/- drawn on Dena Bank, Pitam Pura, New Delhi.
3. It is stated that the complainant presented the said cheque through his banker Delhi State Co-operative Bank Ltd. and the same was returned unpaid vide memo dated 20.12.2006 with the reasons "**Today's opening Insufficient**". It is stated that on 06.01.07 the complainant served legal demand notice

through his counsel through registered AD and UPC which was duly served upon the accused but despite service of legal notice the accused has failed to make the payment . It is prayed that the accused may kindly be summoned and be punished for commission of the offence punishable U/S 138 of N.I. Act.

4. The complainant led pre-summoning evidence and examined himself as CW-1 and deposed in terms of the complaint. The complainant proved the dishonoured cheque as EX CW 1/1, the bank memo regarding dishonour of the cheque as EX CW 1/2, the legal demand notice alongwith postal receipt is proved as EX CW 1/3 to EX CW 1/5.
5. The accused was summoned to face the trial on the basis of pre-summoning evidence. The notice U/S 251 CrPC for commission of the offence punishable U/S 138 of N I Act was served upon the accused on 31.07.10 to which he pleaded not guilty and claimed trial.
6. The complainant examined himself as CW-1 and adopted his pre-summoning evidence already filed by way of affidavit EX CW 1/A . The complainant deposed in terms of the complaint and relied upon the documents already filed by him as EX CW

1/1 to EX CW 1/5. During cross-examination the CW-1 stated that he do not know where the affidavit was got attested. It is stated that he was doing the business of fruit and vegetable commission agent. It is stated that he is working with his father and getting an amount of Rs.20,000/- per month from his father on account of his being working with him. It is stated that he paid a sum of Rs.95,000/- in cash to the accused around four years back. It is denied that he has given a sum of Rs.15,000/- only to the accused which was returned by him. It is stated that he has not given any cheque to the accused and gave cash amount in his shop. It is stated that he has also obtained the permission of his father of giving Rs.95,000/- to the accused. It is stated that he know the accused through one common friend namely Sh. Charanjit Singh . It is admitted that one case is filed by Sh. Charanjit Singh and two cases filed by Sh. Raghunandan and Sh. Fakir Chand are pending in this court. It is stated that the cheque was signed and filled up by the accused before him in the month of February, 2006.

7. The statement of the accused was recorded U/S 313 CrPC. It is stated by the accused that the cheque in dispute bears his signatures and he gave the same to the complainant . It is

stated that he took a sum of Rs.15,000/- as a loan on interest @ 5% per month. It is stated that he agreed to repay the loan within 2 months and within 2 months he had repaid the entire loan amount. It is stated that at the time of taking the loan of Rs.15,000/- he gave the blank cheque as security to the complainant but the complainant did not return the said cheque despite payment of the loan amount. The accused denied the receipt of the legal demand notice. It is stated that he wants to lead defence evidence.

8. The accused examined himself as DW-1 and deposed on Oath that he had taken a loan of Rs.15,000/- on interest at the rate of 5 % per month from the complainant in the month of February 2006 and he returned the loan amount in October, 2006. It is stated that he was paying the interest @ Rs.750/- per month to the complainant every month. It is stated that at the time of taking the loan he had handedover one blank signed cheque and one blank signed stamp paper worth Rs.10/- to the complainant with some photographs and residence proof. It is stated that at the time of returning the whole of the loan amount the complainant did not return him those blank cheques as well as blank signed stamp paper on

one pretext or another. During cross-examination the DW-1 stated that he approached Sh. Charanjit Singh , who is working in his department for a loan and Sh. Charanjit Singh introduced him with the complainant. It is denied that the complainant has not taken the signatures on the blank stamp paper. It is denied that he had filled the blank cheque. It is denied that he had not paid the interest amount to the complainant. It is denied that he has not returned the loan amount to the complainant in October, 2006.

9. The accused examined another DW- Sh. Syed Faizal Huda , Forensic Expert. The DW-2 deposed that he is a Forensic Expert and is a expert witness. It is stated that he had taken the specimen sample of name, amount , date and figure from the writer on the photocopy of the cheque to maintain the variation in the handwriting. It is stated that he scientifically examined and compared the disputed cheque and specimen samples EX DW 2/1 (collectively). It is stated that the report EX DW 2/1 bears his signatures. It is stated that on the cumulative effect of all the above reasons and observations taken together he is of the definite opinion that the disputed amount, name , date and figure marked as DA-1 , DN-1 and

DF-1 have not been written by the same person who has written the specimen samples marked as SA-1 to SA-3 and SF-1 to SF-3. During cross-examination the DW-2 stated that he do not know, if the amount, name of complainant, date and figure on the same is filled up by another person.

10. I have carefully perused the material on record and have gone through the submissions of Ld. counsel for both parties.

11. It is stated by Ld. counsel for the complainant that the accused has not disputed his signatures on the cheque in dispute, therefore, presumption U/S 139 of N I Act is raised in favour of the complainant and against the accused. Therefore, accused is liable to be convicted.

12. On the other hand it is stated by Ld. counsel for the accused that the case of the complainant is full of material contradictions. It is stated that the presumption U/S 139 of N I Act has been rebutted with the testimony of DW-1 and DW-2. It is prayed that the accused may kindly be acquitted.

13. The necessary provision of section 138 of N.I. Act is reproduced as under for guidance :-

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, either because of the amount of money standing to the credit of that 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, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both.”

Provided that nothing contained in this section shall apply unless -

“(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier,

(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation:- For the purpose of this Section, “debt or other liability” means a legally

enforceable debt or other liability.”

14. In the present case it is stated by the accused that the cheque in dispute bearing No. 075342 dated 03.12.2006 for a sum of Rs.95,000/- drawn on Dena Bank, Pitam Pura , New Delhi was issued by the accused in discharge of his legal liability. The accused has also not disputed his signatures on the cheque and stated that the same was handedover to the complainant. In the present case the issuance of the cheque in question is not disputed by the accused and the signatures on the same are also admitted by the accused, therefore, presumption U/s 139 of N I Act for issuance of the cheque in discharge of his legal liability is raised in favour of the complainant and against the respondent. The provision of Section 139 of N I Act is reproduced as under:-

" Presumption in favour of holder:- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability".

15. In the present case the complainant has deposed on Oath that the cheque in dispute was issued by the accused in discharge of his legal liability. The accused has also not disputed his signatures or issuance of the cheque, therefore, presumption U/S 139 of N I Act

regarding issuance of the cheque in discharge of legal liability is raised in favour of the complainant and against the accused. Even though the presumption U/S 139 of N I Act is a rebuttable presumption and the accused by leading the evidence or contradicting the testimony of the complainant can rebut the presumption U/S 139 of N I Act . The accused has raised the defence that he has taken the loan of Rs.15,000/- from the complainant which he had repaid and he issued the blank signed cheque as security against the loan amount but despite repayment of the said loan, the complainant has not returned the cheque in dispute . The accused examined himself as DW-1 and deposed in terms of his defence. Even during cross-examination of the accused no suggestion was given to him that no such alleged amount was given by the complainant to him. Moreover one suggestion given on behalf of the complainant strengthen the defence raised by the accused. The counsel for the complainant gave the suggestion , which has been replied by the accused as under:

" It is wrong to suggest that I had not returned the loan amount to the complainant in October, 2006.

The perusal of this suggestion given by the Ld. counsel for the complainant shows that the complainant himself has admitted the advancement of the alleged loan to the accused. The complainant

in his complaint or in his evidence has nowhere disclosed this amount of loan given to the accused. Therefore, this concealment on the part of the complainant raises shadow of doubt upon the story of the complainant and strengthen the defence of the accused that the cheque in dispute was given by him as a security at the time of taking the loan of Rs.15,000/- from the complainant.

16. It is stated by the complainant that he obtained the cheque EX CW 1/1 which the accused filled in his own handwriting and signed the cheque before him when the loan was given to him. The complainant in his complaint and the evidence has stated that the loan was taken by the accused in the month of February, 2006 and the cheque was issued by the accused on 03.12..06. The complainant has specifically stated that the cheque in dispute was issued after a long time from the date of giving the loan amount, where in his cross-examination the complainant has stated that the cheque in dispute was signed by the accused when the loan was given to him. No justified explanation is given by the complainant regarding this contradiction. This contradiction regarding the time of issuance of the cheque in dispute is very material and fatal for the case of the complainant.

17. It is also pertinent to mention that the complainant during his cross-examination has specifically stated that he obtained the cheque of Rs.95,000/- which accused filled in his own handwriting

and signed the same. The accused stated that he issued the blank signed cheque to the complainant. The accused also examined himself as DW-1 and deposed on Oath that he issued the blank signed cheque to the complainant. The accused examined DW-2 handwriting expert in support of his defence. The DW-2 obtained the specimen writing of the accused and after comparing the same with writing on the cheque in dispute, gave his definite opinion that the disputed amount , name, date and figure on the cheque in dispute is not written by the same person who has written the specimen writing . No suggestion has been given by the counsel for the complainant that the report of the handwriting expert is false or fabricated. There is no other reason to disbelieve the testimony of DW-2 . Therefore, from the testimony of DW-2 it is clear that the particulars on the cheque in dispute are not filled by the accused in his own handwriting, whereas the complainant has alleged that the particulars in the cheque in dispute were filled by the accused himself. This material contradiction in the story of the complainant is also fatal for the complainant.

18. It is well settled law that the accused need not to prove his defence beyond reasonable doubt. The accused has to prove his defence based on the Principle of Preponderance of Probabilities as applicable in civil cases . The accused has to bring just shadow of doubt upon the story of the complainant to take the benefit of his

defence. On this issue I have relied upon the judgment reported as **“V.D. Jhingan Vs. State of Uttar Pradesh, AIR 1966 SC 1762”** wherein it was held:

“..... It is well-established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.....”

I have also placed reliance on another judgment passed by three Judge Bench titled as **“Kali Ram Vs. State of Himachal Pradesh (1973)2 SCC 806: AIR 1973 SC 2773”** wherein it has been held:

“.....One of the cardinal principles which had always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption.

The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.”

19. In view of the above discussions I am of the considered opinion that the accused is able to rebut the presumption of issuance of cheques in dispute in discharge of legal liability raised by the complainant U/S 139 of N I Act. The complainant has failed to prove any other document to prove the consideration of the cheque amount. The complainant has merely relied upon the presumption U/S 139 of N I Act against the accused however the accused by contradicting the statement of CW-1 and by examining himself as DW-1 and DW-2 Forensic Expert as defence witnesses, is able to rebut the presumption U/S 139 of N I Act. Therefore, I am of the considered opinion that the complainant has failed to prove his case beyond reasonable doubt on record that the cheque in dispute was issued by the accused in discharge of his legal liability.

20. In view of the above discussions, I am of the considered opinion that the complainant has failed to prove his case beyond reasonable doubt. The complainant company has failed to prove the necessary ingredient for commission of the offence punishable U/S

138 of N I Act. **Accordingly** **accused Dharmander Kumar**
acquitted for commission of the offence punishable U/S 138 of
N I Act.

Announced in the open court
on 01.06.12

(Devender Kr. Jangala)
Addl. Rent Controller: Rohini