

**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-2020/07
- b. Date of the commission of the offence : 06/09/2007
- c. Name of the complainant Savita Jain
- d. Name of accused person and his parentage: Sushil Kumar Jain,
and residence S/o Late Sh. Jayanti
Prasad Jain, R/o 4/1697,
Mahabir Block, Bholanath
Nagar, Shahdara, Delhi.
- e. Offence complained of : Dishonoring of
cheque for Account closed.
- f. Plea of the accused and his examination (if any): Not guilty
Because accused gave
cheque in question to
some relative of complainant
Sh. Pramod Jain as security
as he took loan of Rs. 1,00,000/-
from him and he already repaid
the same. Accused never took
any money from the complainant.

g.	Final Order	:	Held not guilty. Acquitted.
h.	Order reserved on	:	05.02.2013.
i.	Order pronounced on	:	02.03.2013

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 in year 2006 the accused alongwith his wife came in contact with complainant and asked her to arrange a loan of Rs. 10 lacs against property and complainant had shown inability to arrange the money but accused compelled her to arrange the money with promise to return the same upto July 2007. It is version of complaint that complainant hardly arranged Rs. 7 lacs from different persons, relatives and friends and same were given to the accused as well as his wife as a friendly loan. It is case of complainant that at the time of taking loan accused had mortgaged property bearing number 4/1697, Mahavir Block, Bhalanath Nagar, Shahdara, Delhi and also gave a cheque worth of Rs. 7 lacs vide its bearing number 374656 dt. 14.08.2007 drawn on Andra Bank, Vishwas Nagar, New Delhi Ex. CW1/A (hereinafter referred to as cheque in question). It is also claimed in complaint that accused and his wife also gave an undertaking that complainant shall have all rights over aforesaid property in case of non payment of loan in question and she will be entitled to recover the possession of said house on the basis of paper

which was executed in presence of the marginal witnesses and on the basis of original sale deed of aforesaid property. It is also case of complainant that cheque in question had returned unpaid vide returning memo Ex. CW1/C dt. 16.08.2007 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. 21.08.2007 within stipulated time. Hence, aggrieved from the aforesaid conduct of accused, complainant filed the present complaint case u/s 138 of NI Act on 15.09.2007.

2. Notice of accusation u/s 251 Cr.P.C was served on accused person on 20.05.2008 to which he pleaded not guilty and claim trial. Complainant (CW1) was subjected to extensive cross examination by the counsel for accused on 30.07.2010, 02.02.2011 and 09.05.2011. Explanation of accused qua incriminating evidence u/s 313 Cr.P.C read with 281 Cr.P.C was also recorded on 01.11.2011. Accused (DW1) examined and cross examined u/s 315 Cr.P.C on 11.04.2012. DW2 Sayed Faisal Hudda, (handwriting expert) was also examined and cross examined on 02.11.2012. Counsel for complainant made oral argument in details 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 his signature and bank account number appearing on cheque in question and denied writing of any content appearing on cheque in question. However, it has been consistent plea of accused that he handed over cheque in question to Pramod Jain from whom he had taken Rs. 1 lac and same had been repaid to aforesaid Pramod Jain by him. It is also plea of accused that Pramod Jain did not return cheque in question despite several request on the pretext that same had been lost. Legal demand notice has been admittedly received by the accused as he had filed admitted reply to the same marked A dt. 01.09.2007. Accused admitted his signature appearing on document Ex. CW1/D1, CW1/D2 and CW1/D3 (DW1/A) and signature of his wife on document Ex. CW1/D2. (See the statement of accused u/s 313 Cr.P.C read with 281 Cr.P.C).

6. During cross examination complainant (CW1) stated that accused mortgaged sale deed of his wife and also gave cheque in question when she had paid Rs. 7 lacs to accused. Complainant (CW1) further stated that accused also

executed a written stamp paper for returning her loan. However, complainant admitted during her cross examination that she had not brought any original sale deed or any written stamp undertaking on judicial record of this case. Complainant (CW1) also admitted that she had not filed any income tax return showing transaction in question of Rs. 7 lacs. Complainant (CW1) also stated that document Ex. CW1/D1 and CW1/D2 had been procured by her in respect of loan given to accused by her. However, careful perusal of aforesaid document Ex. CW1/D1 and CW1/D2 shows that accused had taken Rs. 50,000/- in cash from some Gajender Singh on interest at the rate of 2 % per month and wife of accused namely Snehlata had taken Rs. 1,50,000/- on interest at the same rate from same person namely Gajender Singh against registry of property. Complainant further stated that accused did not tender any document other than document Ex. CW1/D1 and CW1/D2. Complainant also denied Pramod Jain being her relative in her cross examination. Complainant stated that cheque in question had been filled entirely before her after taking money of Rs. 7 lacs in cash in year 2006. However, careful scanning of cheque reveals that signature and remaining contents appearing on cheque in question had been written with different pen which tends to inference as to cheque in question filled subsequently by the holder / possessor of cheque in question. Complainant stated during her cross examination that she had taken Rs. 3 lacs from three committees, run by her and Rs. 1.5 lacs was taken from her brother namely Gyan Chand. Complainant also claimed that Rs. 2.5 lacs was at her disposal.

7. Accused Sushil Kumar Jain (DW1) stated that he had taken Rs. 1 lac from Pramod Jain for one year on 23.08.2005 in presence of complainant and handed over a blank signed cheque bearing number 374656 i.e. exact number of cheque in question and one stamp paper of Rs. 50/- as security. Accused (DW1) further stated that after 11 months he had repaid Rs. 1 lac to Pramod Jain in presence of complainant, who is Samdhan of Pramod Jain. Accused filed written stamped paper Ex. CW1/D3, in which it is written that accused had taken Rs. 1 lac from Pramod Jain against some property and issuance of one blank stamped paper of Rs. 50/- and a blank cheque bearing number 374656. Accused claimed that aforesaid document Ex. CW1/D3 bears signature of complainant herself at point A. Here, court is also aware of provision u/s 92 of Indian Evidence Act which prohibits oral testimony contrary to any terms and condition of a written document.

8. Handwriting expert S. F. Huda (DW2) testified that signature appearing at point A on document Ex. CW1/D3 had been written by complainant and he had filed his detailed report Ex. DW2/1. Ld. Counsel for complainant contends that handwriting expert had filed favourable report as he has been engaged by the accused. However, court is of considered view that the job of handwriting expert is to assist the court in reaching just conclusion by furnishing some scientific imputes and his opinion is not binding on the court. Opinion of handwriting expert must be weighed in conjunction with other compelling facts

and circumstances of the case. Here in instant case complainant admitted in her complaint that accused sent a reply dt. 01.09.2007 to her legal demand notice in which accused had alleged that cheque in question and paper of house were given to brother of complainant namely Pramod Kumar Jain. Unlike her statement in cross examination complainant did not deny relationship with Pramod Kumar Jain in para 7 of her complaint. Here, Id. Counsel for accused contends that accused had taken same plea of defence through out of trial of this case and even in his reply to legal demand notice of complainant.

9. Complainant also failed to produce any document showing transaction in question of Rs. 7 lacs. It is important to note that complainant had stated during her cross examination that accused mortgaged his sale deed of house of his wife and accused had also executed a written stamp paper for returning loan in question. However, complainant did not file any aforesaid document on record so far. Here, Ld. Counsel for accused contended that aforesaid suspicious conduct of complainant shows that she had something to hide and such huge loan in question could not be expected to have been advanced by the complainant without any supporting written document. It is also noticeable that complainant had relied upon some document like CW1/D1 and CW1/D2 of year 2003, but she failed to file any written document regarding transaction in question which had allegedly taken place in year 2007. Here, Ld. Counsel for accused suggested that complainant did not file any supportive

document before this court because accused neither took any loan of Rs. 7 lacs from complainant nor executed any document for returning the same to the complainant.

10. Ld. Counsel for accused contended that complainant is not a reliable witness as she had stated during her cross examination that she did not know Gajender Singh whereas she had produced document Ex. CW1/D1 and CW1/D2 showing loan given to accused by some Gajender Singh. Here, obvious question arises as to how documents executed between accused, his wife and Gajender Singh were lying with complainant. Ld. Counsel for accused further contended that aforesaid document Ex. CW1/D1 and CW1/D2 show the bonafide intention of accused and his wife that whenever they took loan from anybody, they executed a document in favour of money lender for that loan.

11. Complainant admittedly did not file any income tax return showing transaction in question of Rs. 7 lacs in cash. Here, Ld. Counsel for accused contends that no transaction of more than Rs. 20,000/- could be conducted in cash and at best, alleged transaction in question could be related to unaccounted black money which is not enforceable before any court of law. During cross examination complainant had stated that she had taken Rs. 3 lacs from her three committees and Rs. 1.5 lacs from her brother Gyan Chand. However, no document regarding withdrawal of Rs. 3 lacs from any committee had been filed

by the complainant. Complainant had not mentioned anything regarding alleged committees as source of loan amount and specific name of Gyan Chand in her complaint and legal demand notice, which were earliest stages for complainant for stating full and true relevant facts. It is curious to note complainant had not examined said material witness namely Gyan Chand for reasons best known to her and no explanation has been given by the complainant in that respect. Complainant opted such course of action on her own peril. Here, Ld. Counsel for accused relied upon judgment of Mumbai High Court passed in **CRL Application number 4188 of 2009 dt. 29.07.2010** wherein it was observed that complainant had failed to prove that cheque in question had been issued towards legally enforceable liability as he had neither adduced any oral evidence nor examined any material witness in respect of alleged sale transaction and giving of Rs. 1.4 lacs by the complainant to husband of accused. **The Bombay High court in another case cited as 2011 (3) crimes 128 (Bom.)** had observed that it suffices if an accused bring the evidence in the form of proof of facts by way of statement made in cross examination of complainant witness which would result in proof of the fact contrary to presumption about truthfulness in respect of a case of complainant by raising defence up to preponderance of probabilities. It was further observed that trial of offence u/s 138 of NI Act is a summary trial and complainant has therefore to bring every thing and evidence at a stretch and not in installments or stages. **In criminal revision petition number 742/2006 dt. 06.12.2006** Hon'ble High Court of Delhi had observed that petitioner is entitled to

acquittal because allegation in complaint appears to be vague and bland and there is nothing on record to establish complainant's case. It was further observed that once presumption u/s 139 of NI Act rebutted, the onus shifts to the complainant to not only establish that cheque issued for the discharge of debt or other liability but such debt or liability was legally enforceable. The relevant para no. 11 of aforesaid decision of Hon'ble High Court of Delhi in case titled as **Pine Product Industries Vs. R. P. Gupta & Sons dt. 06.12.2006** is reproduced hereinunder:-

11. Considering the arguments advanced on behalf of the counsel for the parties. I find that there is no difficulty with the proposition that Section 139 of the Negotiable Instrument Act, 1881 raises a presumption that the holder of the cheque, received the cheque for the discharge, in whole or in part, of any debt or other liability. There is also no dispute that this presumption is a rebuttal presumption. **The presumption has to be rebutted in the course of the trial and once rebutted the onus would shift on the complainant to establish and prove beyond reasonable doubt that the cheque was, in fact issued for the discharge, in whole or in part, of any debt or other liability.** Once this presumption is rebutted then the case has to be considered from the stand point of the explanation contained in Section 138 which says that for the purposes of that Section, "debt or other liability" means a legally enforceable debt of other liability. So, once the

presumption is rebutted, the onus shifts on to the complainant to not only establish that the cheque was issued for the discharge of a debt of other liability but that such debt or liability was legally enforceable.

12. If the petitioner is yet able to show from the evidence on record that the presumption is rebutted then the **complainant must be able to establish from the evidence on record itself that a case under section 138 is clearly made out. The petitioner has been able to show that a contemporaneous reply given by him on 04.02.2000 raised issues with regard to the manner and circumstance under which the complainant came in possession of the cheque in question. However, despite being aware of these issues, when the complaint was filed by the complainant, as rightly pointed out by the learned counsel for the petitioner, the same was significantly vague and bereft of any details.**

Hon'ble High Court of Mumbai in case cited as **2002 (2) JCC 1028** observed that legal presumption u/s 139 of NI Act is rebuttable by the accused and quality of evidence of accused is of not so a high order as that of prosecution in criminal case.

12. Ld. Counsel for accused contended that complainant is a senior citizen, house wife and a widow lady then how she had arranged such huge fund

for giving loan to the accused without executing any document. Moreover, complainant had written in para 3 of her complaint that accused alongwith his wife came into contact with her in year 2006 and compelled her to arrange Rs. 10 lacs. Here, if there was any compulsion from accused on complainant why she had given such huge amount of loan that too after arranging from different persons, relatives and friends. Complainant had also failed to specify the nature of alleged compulsion and need of accused for taking loan in question from her and the name of aforesaid relatives and friends as claimed in para 3 of her complaint. Complainant had also not established the kind of her friendship with accused to whom such huge amount of loan would have been advanced by borrowing the same from various persons without charging any interest thereupon.

13. Ld. Counsel for accused contends that cheque in question had not been issued to the complainant against any legally enforceable liability rather it has been misused by the complainant in collusion and connivance with her relative Sh. Pramod Kumar Jain. Ld. Counsel for accused also contended that the testimony of complainant is not satisfactory and sufficient to prove her case beyond all reasonable doubts. On the other hand, counsel for complainant contends that once cheque has admittedly been signed by the accused legal presumption regarding consideration u/s 118 read with 139 came in favour of complainant and accused failed to rebut the same.

14. 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.

15. 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 02nd Day of March, 2013**

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