

# Savencia Fromage And Dairy India Pvt. ... vs Shree Balaji Trading And Anr on 28 August, 2024

IN THE COURT OF SWATI GUPTA: JM1C - (NI ACT)  
[JSCC-ASCJ-GJ], NEW DELHI DISTRICT, PATIALA  
HOUSE COURT

In the matter of: CT CASE NO.: 2444/2018

DLND030037772018

Savencia Fromage and  
Dairy India Pvt. Ltd.  
(Formerly known as Dabon  
International Private Limited)  
Having its registered office at:-  
3rd Floor, Punjabi Bhawan,  
10, Rouse Avenue,  
New Delhi-110002.

And

Its Corporate Office and Manufacturing  
Unit at A-41 & 42, Phase-II, Extension,  
Hosiery Complex Noida,  
Uttar Pradesh-201305.  
Through its Authorized person  
Mr. Deep Chand

.....Complainant

Vs.

1. Shree Balaji Trading  
To be served at  
Shop No. BR-4, Kaveri Apartments,  
Opposite HDFC bank,  
869, Nana Peth,  
Pune-411002.

Ct. Case No. 2444/2018

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Contact 9049019999, 020 65230713

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2. Mr. Porus Aggarwal  
Partner & Authorized Signatory  
of Shree Balaji Trading  
To be served at  
Shop No. BR-4, Kaveri Apartments,  
Opposite HDFC bank,  
869, Nana Peth,  
Pune-411002.  
Contact 9049019999, 020 65230713

.....Accuse

Date of Institution	of : 16.05.2018
Complaint	(more than 5 years old)
Offence Complained of	: u/s 138 N.I. Act
Plea of Accused	: Not Guilty
Order reserved	: 27.08.2024
Decision	: (Convicted)
Date of Decision	: 28.08.2024
Arguments addressed by	: Sh. Vijender Kumar, Counsel for complainant. Sh. Ravindra Rawat, Counsel for accused.

#### J U D G M E N T :

1. The present complaint has been filed under section 138 Negotiable Instruments Act, 1881 by Savencia Fromage and Dairy India Pvt. Ltd. (hereinafter referred to as the 'complainant') against Shree Balaji Trading and Mr. Porus Aggarwal (hereinafter referred to as the accused persons).

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#### 2. Facts in brief :

2.1 The aforesaid complaint has been filed by the complainant in respect of two cheques bearing number 001375 for an amount of Rs.5 lacs and 001376 for an amount of Rs.10 lacs, dated 28.03.2018 and 20.03.2018 respectively, both drawn on HDFC Bank, Pune Branch, Maharashtra, alleged to be issued by the accused persons in favour of the complainant in respect of their legally recoverable liability. Case of the complainant is that it is world wide supplier of cheese speciality and also produces, imports and sells top quality butter, cream, sauces, dairy desserts and other food products.

The complainant was previously known as Dabon International Pvt. Ltd. and its name was changed to Savencia Fromage and Dairy India Pvt. Ltd. w.e.f. 06.06.2017.

2.2 As per complaint, accused no. 2 (on behalf of accused no. 1) approached the complainant and its officials and placed request for supplying the complainant's products. The complainant supplied its products to the accused no. 1 and 2 as per their specific requests. Complainant used to raise invoices upon accused no. 1 for the aforesaid product. Accused no. 1 and 2 duly accepted the invoices without any objection and put their stamp on the invoices to acknowledge the receipt thereof.

Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. Accused no. 1 and 2 used to make part payment against the invoices raised by the complainant. However, since December, 2017 accused persons failed to make the payment to the complainant and there was an outstanding of Rs.17,58,015.86/- against the invoices. Upon repeated requests of the complainant, accused persons approached the complainant to make the payment of outstanding amount and in

discharge of their liability towards the complainant, accused persons issued the following two cheques in favour of the complainant with the undertaking that the same would be honored upon presentation:

(i) Cheque no. 001376 dated 20.03.2018 for Rs.10 lacs; and

(ii) Cheque no. 001375 dated 28.03.2018 for Rs.5 lacs.

2.3 As per the complainant, cheques in question were presented for payment by the complainant with its bank namely Citi Bank, Baba Kharak Singh Marg, Connaught Place, New Delhi. However, the same were returned unpaid vide cheque return memo dated 21.03.2018 and 03.04.2018 with the remarks 'Funds Insufficient'. A legal notice was sent to the accused on 18.04.2018 by the complainant demanding the amount of cheques in question from them. However, despite Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. the service of legal notice, accused failed to pay the cheque amount to the complainant. Accused persons replied to the said legal notice wherein they gave evasive and false reply. As per the complainant, the amount of cheques in question have not been paid by the accused persons despite service of legal notice. Consequently, the complainant has alleged that an offence under section 138 NI Act has been committed by the accused persons and hence, present complaint is filed against the accused persons.

3. Course of trial 3.1 The complainant led its pre-summoning evidence by way of affidavit of its AR which is Ex.CW1/A. In the pre- summoning evidence, the complainant relied upon the following documents:-

Exhibits	Documents
Ex. CW1/1	Certificate of incorporation pursuant to change of name dated 06.06.2017
Ex. CW1/2	Extract of minutes in favour of AR of complainant
Ex. CW1/3	Copy of ledger account of accused in the books of complainant.
Ex. CW1/4	Cheque bearing No. 001375 dated 28.03.2018
Ex. CW1/5	Cheque bearing No. 001376 dated 20.03.2018
Ex. CW1/6	Returning Memo dated 03.04.2018
Ex. CW1/7	Returning Memo dated 21.03.2018

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Ex. CW1/8	Legal Notice dated 18.04.2018
Ex. CW1/9	Original postal receipt
Ex. CW1/10 and Tracking reports	
Ex. CW1/12	Reply dated 05.05.2018 to the legal notice of complainant.

Mark-A to Mark-C Invoices raised by complainant on the accused.

3.2 On the basis of the aforesaid pre-summoning evidence, the accused persons were summoned. On the appearance of the accused, notice of accusation was served upon accused u/s. 251 Cr.P.C, to which he pleaded not guilty and claimed trial. In his plea of defence, he put forth the defence to the effect that there were business transactions with the complainant but his firm was not liable to pay the cheques amount since accounts were yet to be settled and goods of the complainant were still lying with the accused. He also stated that cheques in question were security cheques issued by accused to the complainant for the goods which were being purchased and they were not towards any particular transactions. Thereafter, statement under Section 294 Cr. PC was recorded wherein accused No. 2 admitted his signatures on the two cheques; admitted that cheques were handed over to complainant but as security; admitted returning memo Ex. CW1/4 and also admitted receipt of legal notice as well as sending reply to the same.

Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. 3.3 The accused was permitted to cross examine the witness/complainant/CW1. In his post summoning evidence, CW1 relied upon pre summoning evidence including the affidavit Ex. CW1/A, documents Ex. CW1/1 to Ex. CW1/12 and Mark A to Mark C. He also filed an affidavit u/s. 65 B Indian Evidence Act, as Ex. CW1/C. CW1 was cross examined and discharged. No other witness was examined by the complainant.

3.4 After the post summoning evidence of the complainant was closed, the entire incriminating evidence was put to the accused in his statement recorded under section 313 Cr.P.C. The accused reiterated his defence as stated in response to notice U/s 251 Cr.P.C and further stated that he was the sole distributor of the cheese production with the Dabon International. He stated that the complainant supplied him chocolate, juices and bar syrup of company Villers, Turani and Cacio with the understanding that they will take back the product if not sold. He requested the complainant company to take back the consumables as they were not sold and issue credit notes but the complainant company did not do so. The cost of the said products is approximately as demanded and he had requested for re-conciliation of the ledger maintained by Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. the complainant company which was not done despite various requests.

3.5. The accused also stated that he wanted to lead evidence and he examined himself as DW1. In his evidence, in chief examination he stated that he is a partner in accused No. 1 firm, and that they are sole distributors of cheese products of Dabon International Pvt. Ltd. (complainant herein) to hotels and restaurants in Pune region. He also stated that in the year 2016, about 170kgs of Ratinato Cheese was returned to M/s Dabon International Pvt. Ltd. as it was infected with fungus and its value was approximately Rs. 1.7 Lakh. He also stated that in the year 2016, cheddar cheese of value of Rs. 3-4 Lakh approximately was also returned to M/s Dabon International Pvt. Ltd. due to bad quality and complaint received from Hyatt Hotel Pune. As per him, price difference and profit was to be given by complainant to accused, which was not given. He further deposed that in the year 2016, complainant also dumped its stock of Villars Chocolate with them to supply to Hotels and Restaurants, on the condition that in case it was not sold, complainant would take it back. The said

product expired while it was with accused. The approximate value of said chocolates dumped with accused was Rs. 13-14 Lakh but no payment was Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. made for it. As per accused, all these issues were raised by E- Mails sent to the complainant in the year 2017 and e-mail was also sent to complainant for reconciliation of statements and issuance of credit notes. As regards cheques in question, accused deposed that they were already lying with the complainant as security deposits and they were not given for any payment. Accused/DW-1 relied upon following documents:

i. Print out of e-mail sent to complainant regarding return of ratinato cheese is Ex. DW1/A;

ii. Print out of e-mail sent to complainant regarding return of cheddar cheese is Ex. DW1/B;

iii. Print out of e-mail sent to complainant regarding return of Villar chocolates is Ex. DW1/C;

iv. Print out of e-mail exchanged with regarding price difference and profit share is Ex. DW1/D;

v. Print out of e-mail sent to complainant regarding reconciliation and credit note is Ex. DW1/E;

Ld. Counsel for complainant cross examined him and he was discharged. No other witness was examined by accused.

3.6. Thereafter, final arguments have been addressed by both the sides.

4. Arguments/case of the complainant Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr.

4.1. On the basis of the aforesaid material on record, it is urged on behalf of the complainant that the accused persons have admitted the signatures on the cheques and they have not been able to probabalize their defence. It is argued that the complainant is entitled to the benefit of presumption U/s 118 read with 139 NI.Act. Ld. Counsel for complainant further pointed out that transactions regarding supply of cheese products by complainant to accused persons are admitted and issuance of cheques is admitted. He also argued that even though the accused has raised the defence that reconciliation of accounts was not carried out but during the trial, the accused has never disputed the statement of account Ex. CW1/3 which is filed by the complainant. No question has been put to CW-1 in this regard and no suggestion has been given to him to show that the statement of account is forged and fabricated. Infact, DW-1/accused No. 2 admitted in his cross examination that he never shared the ledger account with the complainant. Thus, it is argued that the accused persons are raising frivolous plea of non reconciliation of accounts, even though neither accused persons have challenged the statement of account filed by the complainant nor have they filed any statement

of account as per their own record. It is further argued by Ld. Counsel for Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. complainant that the e-mails which are being relied upon by accused persons i.e. Ex. DW1/A to Ex. DW1/E are not supported with any Affidavit under Section 65B of Indian Evidence Act. On the other hand, DW-1 has himself stated in his cross examination that he was not aware regarding the computers from which the print out of said e-mails were taken. He further stated that the Affidavit under Section 63(1) of Bhartiya Sakshya Adhiniyam, 2023 which is filed by accused No. 2 at the stage of final arguments cannot be relied upon, as the said Act is not applicable to the present case and also because the said Affidavit is in contradiction to admissions made by accused No. 2/DW-1 in his cross examination.

4.2 Ld. Counsel for complainant also argued that even if the e-mails Ex. DW1/A to Ex. DW1/E are read, the same do not support the case of the accused, as they are not clear of categorical. Ld. Counsel also argued that reply to legal notice which is Ex. DW1/C1 also shows that defence being raised by accused is contradictory to his own reply. Written submissions were also filed on behalf of complainant. Ld. Counsel for complainant has relied upon following case laws:-

(i) Judgment of Hon'ble Supreme Court of India in case titled as Bir Singh vs. Mukesh Kumar (2019) 4 SCC 197.

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(ii) Judgment of Hon'ble Supreme Court of India in case titled as Dashrathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel & Anr. (2023) 1 SCC 578.

(iii) Judgment of Hon'ble Supreme Court of India in case titled as J. C. Enterprises (Regd.) Vs. Ranganatha Enterprises ILR (2011)III Delhi.

4.3 Thus, it is argued that there is no reason why the cheques were not honoured by the accused and all the ingredients of offence u/s 138 N.I. Act are sufficiently proved against the accused and they are liable to be convicted for the offence u/s. 138 NI Act.

5. Arguments/case of the accused 5.1 Ld. Counsel for the accused has vehemently argued that the accused persons did not owe any liability to the complainant and as repeatedly submitted by the accused, the cheques in question were issued to the complainant as a security. Ld. Counsel for accused persons also argued that the only witness examined by complainant i.e. CW-1 failed to prove any authority in his favour to depose in the present case. He further argued that in reply to most of the questions, the said witness answered that either he was not aware or he did not Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. know. Thus, it is submitted that the witness CW-1 was an incompetent witness and failed to support the case of the complainant.

5.2 Ld. Counsel for accused persons further argued that as per the case of accused persons, credit notes were not supplied by the complainant, as such the accounts in the book of accused could not be completed. It is also argued that the account between parties remain unsettled and hence, complainant could not present the cheques in question for the amount in question. In this regard,

reliance is placed on Ex. DW1/E and cross examination of accused No. 2/DW-1. Ld. Counsel for accused also argued that goods dumped with the accused had expired as referred in Ex. DW1/C and as such they were not in a fit condition to be sold further. Hence, even if they were not returned physically, it does not matter. Accordingly, Ld. Counsel for the accused submitted that the accused persons have successfully rebutted the presumption under section 139 read with section 118 NI Act and accordingly, they cannot be held liable for the offence u/s 138 of N.I. Act.

6. Detailed arguments have been heard and record carefully perused and considered.

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7. Ingredients of the offence and appreciation of evidence.

7.1 In order to determine criminal liability of accused under any penal provision, it is first and foremost to look at the relevant provision. Section 138 of NI Act for which the accused was tried reads as follows:

" Section 138. Dishonour of cheque for insufficiency, etc., of funds in the accounts- 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 that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for "a term which may extend to two year", 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  
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by him from the bank regarding the return of the cheques 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."

7.2 The law as regards the offence u/S. 138 NI Act is fairly well settled. In order to constitute an offence u/s 138 NI Act, following ingredients and requirements are required to be proved and fulfilled:

- i. A cheque is drawn by a person on an account maintained by him with a banker;
- ii. The said cheque is drawn for payment of any amount of money to another person for the discharge, in whole or in part, of any debt or other liability ("debt or other liability", being a legally enforceable debt or other liability);
- iii. The said cheque is returned unpaid by the bank either for the reason of insufficient funds' or for reason of 'exceeds arrangement';
- iv. The said cheque must be presented within 3 months or within the period of validity, whichever is earlier;

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v. A notice regarding the dishonour of the cheque and demanding the payment of the amount of the cheque in question is given by the payee to the drawer of the cheque within 30 days of the receipt of information regarding dishonour of cheque; vi. The drawer of the cheque has failed to make the payment of the cheque within 15 days of the receipt of the said notice.

7.3 The accused have admitted issuance of cheques albeit as security cheques. The cheques in question have been issued from the account of partnership firm namely M/s. Shree Balaji Trading/accused No. 1. Admittedly, accused no.2 is one of the partner in the said firm. Accused no.2 has admitted his signature on both the cheques in question. There is also no dispute as to the presentation of cheques within the period of validity. Return of cheques as unpaid for reason 'funds insufficient' is also not controverted by the accused. The accused have also not denied receipt of legal notice. Rather, reply to legal notice was also sent by the accused. Lastly, non payment of amount of cheques in question after 15 days of service of legal notice and even till date is also not in dispute. Thus, all ingredients of offence u/s 138 NI Act at Sl (i) and (iii) Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. to (vi) in para 7.2 above can be said to have been proved. The only ingredient that is now left to be considered is whether or not the cheques in question were issued in discharge of legally enforceable debt or other liability.

7.4 Before embarking on the appreciation of material on record to determine whether or not the cheques in question were issued in discharge of legally recoverable debt or other liability, it is pertinent to take a look at Sections 118 & 139 of NI Act which are as follows.

"Section 118: Presumptions as to negotiable instruments:



Until the contrary is proved, the following presumptions shall be made.

(a) of consideration that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration.

" xxxxxxxx xxxxxxxx xxxxxxxx".

"Section 139. 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 Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr.

discharge, in whole or in part, or any debt or other liability."

7.5 It is settled law that once the issuance of cheque is admitted by the accused, the aforesaid Sections 139 and 118 of NI Act come into effect. The said sections mandate that it shall be presumed that the issuance of cheque was for the discharge, in whole or in part, of debt or other liability and it has been held time and again that the said presumption is a rebuttable one and its only effect is to shift the initial burden of proof on the accused. There is no gainsaying that in order to rebut the said presumption u/s. 139 read with Section 118 of the NI Act which operates in favour of the complainant and to shift back the burden of proof on the complainant, the accused is only required to raise a probable defence and he cannot be expected to discharge an unduly high standard of proof i.e. standard of proof for rebutting the presumption raised u/s. 139 NI Act is "preponderance of probabilities". It is also well settled that the accused can rebut the said presumption either directly or by bringing on record preponderance of probabilities by reference to the circumstances upon which he relies. For this purpose, accused is also entitled under law to rely upon all the evidence led in the case including that of the complainant as well and it is also conceivable that in some cases, the accused may not Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. need to adduce evidence of his/her own. However, at the same time it is also to be remembered that bare denial of the existence of legally enforceable debt or other liability cannot be said to be sufficient to rebut the presumption and something which is probable has to be brought on record to shift the onus back to the complainant.

7.6 Let us now examine the defence of accused in the light of above legal position. The main defence being raised by the accused can be summarised as follows:

- i) In the year 2016, ratinato cheese of approximately Rs. 1.7 lakhs and cheddar cheese of approximately Rs. 3-4 lakhs was returned to the complainant company.
- ii) Price difference and profit was to be given by the complainant company which was not given.

iii) Complainant also dumped its stock of Villers chocolate of approximately Rs. 13-14 lakhs with the understanding that it would be taken back if not sold. The said product expired while it remained with the accused but no payment was made for it.

iv) Accused requested the complainant to issue credit notes and for reconciliation of accounts by way of e-mail, but it was not done.

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v) Cheques in question were lying with the complainant as security deposits and were not given for any payment.

7.7 Let us first deal with the argument of Ld. Counsel for accused that cheques in question were issued as security cheques to the complainant for the goods being purchased by the accused and not towards any particular transaction. In this regard, it must be noted that recently in the judgment of Sunil Todi vs. State of Gujrat 2022 (16) SCC 762, Hon'ble Supreme Court has clarified that there is no inflexible rule which precludes the drawee of a cheque issued as a security from presenting it from payment in terms of the contract and it all depends on whether a legally enforceable debt or liability has arisen or not. It is further noted in the said judgment that when a cheque is issued even though as security, the consequences flowing therefrom are known to the drawer of the cheque and if the same is presented and dishonored, holder of the cheque/drawee would have the option of initiating civil proceedings for recovery or criminal proceedings for punishment. It is also relevant to refer to the judgment of Hon'ble Delhi High Court in the case of Credential Leasing & Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. Credits Ltd. Vs Shruti Investments & Anr. 2015) 223 DLT 343, wherein it has been held as follows:-

"30. Thus, I am of the considered view that there is no merit in the legal submission of the respondent accused that only on account of the fact that the cheque in question was issued as security in respect of a contingent liability, the complaint under Section 138 of the NI Act would not be maintainable. At the same time, I may add that it would need examination on a case to case basis as to whether, on the date of presentation of the dishonoured cheque the ascertained and crystallised debt or other liability did not exist. The onus to raise a probable defence would lie on the accused, as the law raises a presumption in favour of the holder of the cheque that the dishonoured cheque was issued in respect of a debt or other liability. As settled by the Supreme Court, the said onus obliges the accused to raise a defence - either by picking holes in the case of the complainant and/or by positively leading defence evidence which leads the Court to believe that there is a probable defence raised by the accused to the claim of the complainant with regard to the existence of the debt or other liability. The said onus does not cast as stringent an obligation on the accused, as it casts on the complainant, who has to prove beyond reasonable doubt the guilt of the accused."

7.8 Similarly, in another judgment of Hon'ble High Court of Delhi in the case of Suresh Chandra Goyal vs Amit Singhal (2015) 2 DLT (Cri) 803, it was held as follows:-

"28. There is no magic in the word " security cheque", such that, the moment the accused claims that the dishonoured cheque (in respect whereof a complaint Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr.

under Section 138 of the Act is preferred) was given as a " security cheque", the Magistrate would acquit the accused. The expression " security cheque" is not a statutorily defined expression in the NI Act. The NI Act does not per se carve out an exception in respect of a " security cheque" to say that a complaint in respect of such a cheque would not be maintainable. There can be mirade situations in which the cheque issued by the accused may be called as security cheque or may have been issued by way of a security, i.e. to provide an assurance or comfort to the drawee, that in case of failure of the primary consideration on the due date, or on the happening (or not happening) of a contingency, the security may be enforced. While in some situations, the dishonor of such a cheque may attract the penal provisions contained in Section 138 of the Act, in others it may not."

7.9 In both the above judgments passed by Hon'ble High Court of Delhi, appeal against acquittal was allowed and accused was convicted for offence U/s 138 NI Act. Thus, in the present case also accused cannot escape the liability for dishonor of cheque merely by contending that the cheques were issued as security cheques. It is admitted by accused persons that goods were being purchased from the complainant and cheques in question were issued as security for those. What is to be considered is whether or not at the time of presentation of cheques in question, there was legally enforceable and crystalized debt or not. In this regard, complainant has relied upon statement of account Ex. CW1/3 and invoices Mark-A to Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. Mark-C. As per accused the said statement of account was not reconciled and he did not owe the sum of Rs. 17,58,015.86/- to complainant for reasons stated in para 7.6 above.

7.10 It must now be noted that in order to prove his defence, accused has relied upon documents Ex. DW1/A to Ex. DW1/E which are e-mails exchanged between the parties. In order to prove the said emails, the accused was required to furnish a certificate under section 65B Indian Evidence Act, however, no such certificate under section 65B Indian Evidence Act is furnished by the accused during his evidence. Though at the time of final arguments, accused furnished a certificate u/s. 63(1) of Bhartiya Sakshya Adhiniyam 2023, however the same cannot be read in evidence as the said Act does not apply to the present trial and the said affidavit is not tendered in evidence. Furthermore, as regards Ex. DW1/C and Ex. DW1/D, accused No. 2 in his cross examination stated that the print out of the said e-mails was taken in his office; it must have been taken either by him or his staff; he could not tell in which computer or device the e-mails were stored and he could not tell regarding the details of printer from which the print was taken. Thus, DW-1/accused No. 2 himself admitted that he was not aware about the computer in which the e-mails Ex. DW1/C and Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. Ex. DW1/D were stored or the printer from which said e-mails were printed. He could also not clearly answer as to who had taken the print out.

In these circumstances, the affidavit filed U/s 63(1) of Bhartiya Sakshya Adhiniyam 2023 does not inspire confidence. It is also found noteworthy that in the said affidavit, it is stated that the e-mails exchanged between the complainant and the accused were printed from the computer installed at the office of the accused and his Advocate. However, it is not even specified as to which e-mail was printed from the office of accused and which e-mail was printed from the office of his Advocate.

7.11 Furthermore, as regards Ex. DW1/E, accused No. 2 in his cross examination stated that "The print out of Ex. DW1/E was taken in my lawyer's office as it was mailed by me to my lawyer. I cannot tell in which computer or device the e-mail was stored. I can also not tell regarding the details of printer from which the print was taken." Again, DW-1/accused No. 2 himself admitted that he was not aware about the computer in which the said e-mail was stored or the printer from which it was printed and that the said e-mail was printed in his lawyer's office. In these circumstances, the affidavit filed U/s 63(1) of Bhartiya Sakshya Adhiniyam 2023 does not inspire confidence.

Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. It is also found noteworthy that in the said affidavit, it is stated that the e-mails exchanged between the complainant and the accused were printed from the computer installed at the lawyer's office of the accused. It is not clear as to how the accused could give the certificate U/s 63(1) of Bhartiya Sakshya Adhiniyam 2023 in respect of document printed in his lawyer's office. Thus, the said affidavit does not at all fulfill the requirement of law and cannot be relied upon.

7.12 Be that as it may, the defences being raised by the accused have been considered and dealt with in the following part of the judgment even assuming the e-mails Ex. DW1/A to Ex. DW1/E have been proved.

7.13 As regards the claim of the accused that in the year 2016 ratinato cheese and cheddar cheese were returned to the complainant company, it must first be noted that no such submission was made by the accused either in response to notice framed under section 251 CrPC or at the time of recording of his statement under section 313 CrPC. At both the said times, accused raised the defence of non-settlement/non- reconciliation of the accounts and that goods of complainant were dumped by the complainant with the accused but not the Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. defence of return of products. The defence of ratinato cheese and cheddar cheese being returned by accused to complainant is raised for the first time at the time of evidence of DW-1 only. It is also noteworthy that there are on record two replies sent by the accused to the complainant in response to the legal notice of the complainant. The first reply to legal notice is dated 05.05.2018 and it is Ex. CW1/12 and it is admitted by the accused in his statement under section 313 Cr.PC. The second reply is dated 24.05.2018 and it is Ex. DW1/C1, which is admitted by accused No. 2 in his cross examination as DW-1. Perusal of both the said replies shows that in the said replies also the defence of return of ratinato cheese or cheddar cheese and of non-issuance of credit notes for the return was not taken by the accused.

7.14 In order to prove his said defence regarding return of ratinato and cheddar cheese, accused relied upon emails Ex. DW 1/A and Ex. DW1/B. Even if for the sake of arguments, it is assumed that the said emails Ex. DW1/A and Ex. DW1/B have been proved, these do not help the case of the

accused at all. What can be gathered from a perusal of Ex. DW1/A is that an e-mail was sent from accused no.1 to accused No. 2 and by accused No. 2 to M/s. Dabon International regarding returned Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. quantity of ratinato cheese in September 2016. The attachment to the said e-mail contained the description of the product i.e. ratinato cheese and the total weight of cheese returned as 170.197. In the said email, the value of cheese being returned is not mentioned and there is no request whatsoever for issuance of credit note in respect of the said return. Even DW-1 in his cross examination admitted that "I did not mention the amount to be paid by complainant towards return of ratinato cheese, in any of the e-mail sent to the complainant. (Vol. Once the complainant was informed regarding return of cheese, it was for complainant to issue credit note), I did not make a written request to complainant for a credit note in respect of return of ratinato cheese". Thus, without mentioning the amount of return cheese products and without even asking for credit note, accused cannot expect the Court to assume that credit note of a certain amount was to be issued by complainant but not issued.

7.15 Similarly, from Ex. DW1/B, it can only be seen that an issue regarding quality of cheddar cheese was raised and the factum of return of cheddar cheese is not even mentioned in the said e-mail. Further, as regards the amount of cheddar cheese claimed to be returned by accused, it is also stated in the cross examination of DW-1 that "I did not mention the amount to be Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. paid by complainant towards return of cheddar cheese, in any of the e-mail sent to the complainant. (Vol. Once the complainant was informed regarding return of cheese, it was for complainant to issue credit note), I did not make a written request to complainant for a credit note in respect of return of cheddar cheese". Thus, there is no material to support the case of the accused that ratinato cheese worth Rs. 1.7 Lakh and cheddar cheese worth Rs. 3-4 Lakh was returned to complainant or credit notes in respect of the same had to be issued by complainant but not issued. Thus, the defence regarding return of ratinato cheese or cheddar cheese being raised by the accused at the stage of his defence evidence is clearly an afterthought and is not even corroborated with the documents filed by him i.e. Ex. DW1/A and Ex. DW1/B. 7.16 Similarly, as regards the defence of the accused that price difference and profit was to be given by the complainant company which was not given, the same is also being raised for the first time in the defence evidence of the accused. The said defence was neither raised in response to notice framed u/s. 251 CrPC nor at the time of recording of statement u/s. 313 Cr.PC nor in any of the replies to the legal notices sent by the Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. accused i.e. Ex. CW1/12 or Ex. DW1/C1. In order to support the said defence, accused has relied upon e-mail Ex. DW1/D. 7.17 Even assuming the said e-mail Ex. DW1/D is proved, a perusal of the said e-mail shows that firstly one e-mail is received by the accused No. 1 firm from Westin Pune and thereafter, an e-mail is sent by the accused no. 2 to one Sh. Gaurav Tandon of Epicure giving him the comparison of rates between his firm and Westin Pune. In the said email, it is stated that, "Dis is the rate given by you to Westin hotel expect bufollow Mozzarella, sum rates r cheaper den you supply me, even though I take it in bulk, and it's not fair, rest u see". Thus, even if the said email is considered to be proved to be sent to complainant or its representatives, it nowhere shows that the complainant was supposed to pay price difference to the accused but it was not paid. In the said e-mail, the accused has simply raised a grievance that some goods are being supplied to Westin hotel at rates cheaper than those at which goods are being supplied to accused firm. By the said email, the accused does not even ask for payment of price

difference nor does it refer to any agreement between the parties to claim the price difference. Rather, DW-1 has admitted in his cross examination that there is no written agreement between Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. complainant and accused regarding payment of price difference and profit. Further, the accused has himself not quantified the price difference or profit which was supposed to be paid by the complainant but it was not paid. Hence, the said defence being raised by accused is also an afterthought, based on assumptions and is not even supported by any document.

7.18 Coming now to the defence of the accused that the complainant had dumped its stock of Villers chocolate of approximately Rs. 13-14 lakhs with the understanding that it would be taken back if not sold. It is noteworthy that in the examination of DW1, he has stated that it was in the year 2016 that the complainant dumped its stock of Villers chocolate with the accused. In order to prove the said defence, the accused has relied upon emails which are Ex. DW1/C. 7.19 Even if it is assumed that the said e-mail Ex. DW1/C is proved, the e-mail simply states that, "the total stocks we have at present" and there is an attachment with description "villars, torani & cocio.xlsx". It does not anywhere mention about the alleged arrangement between the parties that the stock was dumped by complainant with the understanding that it would be taken back if not sold. It also does not show that by the said Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. e-mail, the accused asked the complainant to take back the stock lying with it or asked for payment in respect of the same or credit note for the same. Even the value of the stock is not mentioned in the attachment or the e-mail. Though with respect to the stock of villars chocolate, per unit price and quantity is mentioned, as regards the stock of cocio and torani, even per unit price is not mentioned. In such a case, it is not clear how the accused can expect the Court to assume the value of such stock to be Rs. 13-14 lakhs. Furthermore, in the cross examination of DW-1, he admitted that there was no document in writing between complainant and him regarding understanding that villars chocolate would be returned, if not sold. He has further stated that it was oral understanding. If that be so, it was atleast incumbent on the accused to show some prima facie record of such an understanding. However, even the e-mail relied upon by accused Ex. DW1/C does not support the case of the accused regarding any such understanding. It may also be noted that DW-1/accused No. 2 also admitted in his cross examination that he did not send any written communication to complainant asking for Rs. 13-14 Lakhs towards villars chocolates. He also admitted that he did not have any return receipt for return of villars chocolates to complainant.

Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. 7.20 Now, it is also important to note in this regard that the accused in his reply dated 24.05.2018 to legal notice which is Ex. DW1/C1, stated that it was in and about the months of February - March 2018 that the complainant dumped its excess stock with accused in spite of there being no demand from the accused. The relevant portion of the said reply is reproduced hereunder:

"11. My clients states that in and about the months of February - March 2018, your client has dumped its excess stock with my clients, in spite of there being no any demand from my clients. My clients state that as per the information given by the erstwhile Dabon International Pvt. Ltd. to my clients that they were in process of being taken over by your clients and therefore were in a hurry to dispose off all their

perishable products and hence made a supply of excess products to my clients, without there being any demand for the same in the market. My clients have been following up with your client for the return of the excess / dumped products but to no avail. Accordingly, my clients were and are not at all liable for the payment of the excess products supplied by your client, without any specific orders / request and / or instructions of my clients to that effect and my clients puts. your client to strict proof thereof."

7.21 If it is to be believed that stock was dumped in 2018, then its price was not included in statement of account which claims the amount till December 2017. Further, it may be Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. noted that the reply to legal notice and the testimony of DW1 are inconsistent in as much as in the reply to legal notice, it is stated that the stock was dumped in February - March 2018 while in the testimony of DW1, it is stated that the stock was dumped in 2016. If the stock was dumped before 2016 then also it was incumbent upon the accused to show the corresponding entry in the statement of account. If the complainant is claiming money in respect of dumped stock, there must be a corresponding entry in statement of account. However, neither accused has pointed out any such entry nor cross examined CW-1 in this regard.

7.22 The accused has also vehemently raised the defence that the accounts between the parties had not been reconciled or settled and the accused firm was not liable to pay the cheques amount to the complainant. Rather as per accused, the accused firm was not liable to pay any amount whatsoever to the complainant. It may be noted that even though the complainant has filed the ledger account of accused firm in the books of complainant which is Ex. CW1/3, no question is put to the witness CW1 in respect of the same. Not a single suggestion has been given to the said witness either to suggest that the statement of account Ex. CW1/3 is false or fabricated or forged Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. or to suggest any particular transaction in the said statement is not reflected correctly. The said document was available with the accused since the beginning of trial, thus, if any of the transactions in the said ledger was found to be incorrect by the accused, it was for them to bring out the discrepancy in the cross examination of witness CW1 or by his own evidence. But he failed to bring out any incorrect entry or discrepancy in the statement of account filed by the complainant.

7.23 It was vehemently argued on behalf of accused persons that admittedly reconciliation of accounts was not carried out and that it was for the complainant to issue credit notes to accused persons and as the credit notes were not issued, the accounts could not be completed in the books of accused persons. In this regard, it must be noted that DW-1 in his cross examination admitted that he never shared the ledger account with the complainant though, he voluntarily stated that he had made requests to the complainant for reconciliation of ledger accounts. He further admitted that he did not make any such requests in writing. In his chief examination he has relied upon Ex. DW1/E to contend that accused had asked the complainant for reconciliation of statements and issuance of credit notes.

Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. 7.24 Even if it is assumed that Ex. DW1/E is proved, it can be seen from the said e-mails that on 03.04.2017, an e-mail was sent by M/s Dabon International to accused No. 2 asking for its ledger for reconciliation. Thereafter, on 04.04.2017, accused No. 2 sent an e-mail to M/s Dabon International stating that as credit notes were not provided, its ledger was not updated. Now, it must be noted that said exchange has taken place in April, 2017 but as per the ledger account Ex. CW1/3, the transactions are recorded till 31.03.2018 and as per the complainant no payment was made by accused after December, 2017. In the statement of account Ex. CW1/3, several sales, payments, returns are recorded including a transaction for credit note, between April 2017 till December 2017. None of the transactions either prior to April 2017 or after April 2017 as referred to in the statement of account has been shown to be erroneous, incorrect, false or even doubtful by the accused. Thus, Ex. CW1/3 has not been challenged or shown to be incorrect or doubtful by the accused at any stage during the trial.

7.25 Considering that the accused has been stating during the entire trial that the accounts were not settled, it was incumbent on the accused to file the statement of account or ledger Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. account existing in its book. If the case of accused were to be true, that its books were not complete due to non issuance of credit notes or that the accounts were not reconciled between the parties, then it was incumbent on the accused to bring on record his statement of account as per admitted transaction and then to show disputed transactions and with the help of admitted and disputed transactions, show that as per accused no amount or less amount was owed by accused to complainant. It was for the accused to show the discrepancies in the statement of account filed by the complainant. Even a single false or doubtful transaction shown in the statement of account filed by the complainant could have clinched the matter in favour of the accused. However, in the absence of the same, the defence of accused regarding non-reconciliation of account has remained a bare averment, without any consequence and without probablizing the defence of accused, to justify the dishonor of cheques in question.

7.26 Much reliance was also placed by the Ld. Counsel for accused persons on the cross examination of CW-1 as the said witness in response to many questions stated that he did not know or he could not tell or he was not aware. However, simply because CW-1 was unable to answer some questions Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. clearly, it does not mean that his entire testimony has to be ignored. It must be noted that the said witness was not aware about certain e-mail IDs of complainant company or the e-mails exchanged between the accused and complainant company through Sh. Gaurav Tandon and Sh. Sumit Sachan. In the preceeding paras, all the e-mails filed by the accused as Ex. DW1/A to Ex. DW1/E have been considered and it is concluded that they do not help the case of the accused, in any way. Thus, it is not fatal to the case of the complainant that CW-1 could not answer in this regard. Similarly, it is irrelevant that CW-1 could not answer questions regarding Sumit Sachan or that whether the complainant company dealt with the products under the brand names Villar, Torani and Cocio. Thus, the reliance placed on the cross examination of CW-1 to the extent he could not answer some questions is misplaced and does not help the case of the accused.



7.27 It may also be noted that questions were put to CW-1 regarding invoices Mark-A to Mark-C or the purchase order in respect of the same or the original invoice etc. However, it must be noted that it was never the defence of the accused during the entire trial that it had not received the goods in respect of invoices Mark-A to Mark-C. Neither in response to Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. notice nor in statement under Section 313 Cr. PC nor even in his chief examination accused stated that the goods purported to be supplied under invoices Mark-A to Mark-C were not infact supplied to accused. From the statement of account Ex. CW1/3, it is noted that after the said 3 transaction as reflected in invoices Mark-A to Mark-C, payments are purported to be made and invoices are also issued. However, none of the said transactions are disputed or disproved by the accused, as already noted above. CW-1 also answered in his cross examination that he was not sure whether the running account Ex. CW1/3 maintained by complainant was ever shared with accused for conciliation or comparison or not. However, again merely because account may not have been shared with the complainant does not by itself show that accused had no legally recoverable liability towards the complainant. Accused persons have failed to even prima facie show that they did not owe the sum of Rs. 17,58,015.86/- as per the statement of account Ex. CW1/3 to the complainant at the time of presentation of cheques in question. Lastly, it was also argued on behalf of accused persons that CW-1 did not produce the minutes book and hence he was not authorized to depose in the present case or file the present complaint. However, it must be noted that extract of minutes of meeting dated 15.12.2017 passed by the Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. Directors of complainant company is proved as Ex. CW1/2 which is not challenged or disputed by the accused. Hence, non filing of minutes book is also not fatal to the case of the complainant.

7.28 In view of aforesaid facts and circumstances, it cannot be said that accused succeeded in discharging the initial burden of proof which was placed upon him by way of presumption u/s 139 NI Act and 118 NI Act. The defence of accused that ratinato cheese and cheddar cheese was returned; price difference or profit was not paid by complainant; stocks were dumped by complainant or accounts were not reconciled or credit notes were not issued, is not found to be probable defence, so as to shift the burden of proof on complainant. The accused has not been able to probabalise his defence that the cheques in question were not given in respect of any legally recoverable liability or that the amount of cheques in question was not owed or liable to be paid by accused to complainant as reflected in statement of account Ex. CW1/3, at the time of presentation of cheques in question.

8. Finding and Judgment Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr. 8.1 In view of the aforesaid facts and circumstances, I am of the considered opinion that the accused persons have not been able to prima facie show that they did not owe the amounts of cheques in question to the complainant at the time of presentation of cheques. Resultantly, the complainant is entitled to the benefit of presumption u/s 139 NI Act. Accordingly, accused No. 1 and 2 are liable to be convicted.

8.2 Resultantly, the accused No. 1 and 2 stand convicted for the commission of offence u/s 138 of the N.I.Act.

Let a copy of this judgment be provided forthwith to the convicts, free of cost.

Let the convicts be heard on the quantum of sentence separately.

A copy of this judgment be placed on the official website of the District Court.

	SWATI	GUPTA
Announced in the	GUPTA	Date:
		2024.08.28
open court today on 28.08.2024.		16:21:02 +0530
	(SWATI GUPTA)	
	JM1C (NI ACT)	
	[JSCC-ASCJ-GJ]	
	NDD, PHC/NEW DELHI.	

Savencia Fromage and Dairy India Pvt. Ltd. vs. Shree Balaji Trading & Anr.