

Delhi District Court

Ld. Counsel For Accused Has Relied ... vs . M/S Sharma on 3 November, 2011

Author: Mr.Devender Kumar

"IN THE COURT OF SH. DEVENDER KUMAR GARG : MM (E) :

KKD:DELHI"

CC No. : 476/04

PS : Mandawali

U/s : 138 of NI Act

Unique Case ID No. 02402R0603632004

Date of Institution : 04.08.2004

Date of reserve of order : 21.10.2011

Date of announcement : 03.11.2011

J U D G M E N T

1. Serial No. of the case : 476/04

2. Name of the Complainant : Sh. Sushil Verma S/o Sh. H.K.
Verma, R/o; H/No. A-24, Giri
Marg, Mandawali Fazalpur, Delhi-
110092.

3. Date of incident : 22.05.2004

4. Name of accused person : Sh. Gopal Singh Bisht S/o Sh. Narain
Singh Bisht, R/o; A-15, Giri Marg, (near
Dr. Gumber Clinic), Mandawali Fazalpur,
Delhi-110092.

5. Offence complained of : U/s 138 of NI Act

6. Plea of accused : Pleded not guilty

7. Final Order : Convicted

CC No. 476/04

8. Date of such Order : 03.11.2011

1/15

BRIEF REASONS FOR SUCH DECISION:

1. The case of the complainant as per complaint is that the complainant and respondent are the residents of same locality and are having friendly relationship for last many years and in the month of February 2004, the respondent came to the complainant and demanded Rs. 50,000/- from him and requested to give the amount as a friendly loan and assured that the said loan amount would be returned within 3 months, as respondent was in urgent need of money, so, keeping in view the friendly relations with the respondent, the complainant gave Rs. 50,000/- (rupees fifty thousand only) in cash to the respondent.
2. As per complaint, in discharge of his liability, the respondent issued a cheque bearing no. 045841 dated 22.05.2004 of Rs. 50,000/- drawn on Indusind Bank, Preet Vihar, Branch, C-61, Preet Vihar, Delhi-110092, with an assurance that the said cheque will be honoured when presented for encashment.
3. As per complaint, on 27.05.2004, the complainant presented the above said cheque bearing no. 045841 dated 22.05.2004 of Rs. 50,000/- drawn on Indusind Bank, Preet Vihar Branch, C-61, Preet Vihar, Delhi-110092 with his banker for encashment but the same was returned/unpaid with the CC No. 476/04 2/15 endorsement "Account closed" vide cheque returning memo dated 28.05.2004 through his banker I.e. Citi Bank, Delhi.
4. As per complaint, the complainant immediately contacted respondent and apprised the story regarding the dishonour of the cheque but the respondent neither paid nor tendered the cheque amount to the complainant, inspite of repeated requests and demands made orally and flatly refused to repay the cheque amount.
5. As per complaint, finding no other way the complainant got issued a legal notice dated 07.06.2004 to the accused/respondent through his counsel by Regd. A.D. and U.P.C. dated 8.06.2004 which was duly served upon the accused/respondent, an acknowledgment duly signed by the respondent has been received back by the complainant. But after the expiry of the 15 days of the service of the said notice, the accused knowingly/intentionally neither made any reply nor cleared outstanding under the said cheque.
6. As per complaint, on account of dishonour of the above said cheque for Rs. 50,000/- in question, accused/respondent has committed offence under section 138 and 142 of Negotiable Instrument Act and under section 420 IPC as well as under the other laws of land with consequential prosecution, punishment, fines, penalties. It is further stated that issuance of cheque by accused/respondent is conclusive proof of his liability and he cannot avoid the CC No. 476/04 3/15 same. The said cheque has been issued by accused/respondent with ulterior motives and with malafide intentions as at the time of issuance of said cheque accused/respondent was fully aware of the fact that the same would be dishonoured on presentation. Hence the present complaint.

7. Vide order dated 04.08.2004, cognizance of offence u/s 138 of Negotiable Instrument Act was taken and accused was summoned by the Ld. Predecessor of this court. On appearance of the accused notice of accusation u/s 251 Cr.P.C. was framed against the accused vide order dated 01.10.05 to which the accused pleaded not guilty and claimed trial.

8. For proving his case the complainant has examined himself as CW1. After that CE was closed and matter was adjourned for statement of accused u/s 313 Cr.P.C. All the incriminating evidence was put to the accused and he stated that he wants to examine witness in his defence. Sh. Govind Singh Bisht has examined himself as DW1 and thereafter DE was closed.

9. I have heard Sh. V.K. Singh, Ld. Counsel for complainant and Sh. C.C.S. Tomar, Ld. Counsel for accused and perused the material on record carefully. Ld. Counsel for accused has relied upon M/s Kumar Exports Vs. M/S Sharma Carpets AIR 2009 Supreme Court 1518, Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, 2008 (1) JCC (NI) 50 Ramesh Ratilal Tanna Vs. Gautam Jayantilal Nagarwala 2002 (2) JCC 1028.

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10.Ld. counsel for accused has contended that no loan was given

complainant to the accused. He has further contended that complainant has not been able to prove that there exists any friendly relationships between the complainant and the accused. He has further contended that the complainant has remained improving his version step by step in the complaint and during proceedings of the complainant.

11.He has further contended that no document has been placed on record which would show the advancement of loan and neither the provisions of Income Tax Act were followed by the complainant which itself would show that no such loan was given by the complainant. He has further contended that the real name of accused is Govind Singh Bist however the complaint has been filed in the name of Gopal Singh Bhist. He has further contended that no case is made out against the accused and complainant has failed to prove the liability of accused.

12. On the other hand, Ld. Counsel for complainant has contended that cheque in question was issued by the accused in discharge of his liability. He has further contended that Gopal Singh Bhist and Govind Singh Bist are one and the same person and the cheque in question was issued by the accused. He has further contended that the cheque in question was dishonoured on the ground of 'account closed' and not on the ground of signature differs. He has CC No. 476/04 5/15 further contended that had the cheque in question been issued by person other than accused in that case the ground of dishonoured of cheque would have been signature differs/incomplete signature but the case is not same here.

13.For deciding present complaint some of the relevant provisions of Negotiable Instruments Act are as under :□"Sec 138. Dishonour of cheque for insufficiency, etc., 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 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 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;

CC No. 476/04 6/15 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 purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

Sec. 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 discharge, in whole or in part, of any debt or other liability.

Section 142. Cognizance of offences. ☐Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)☐a. no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

b. such complaint is made within one month of the date on which the cause☐of☐action arises under clause (c) of the proviso to section 138: [Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had CC No. 476/04 7/15 sufficient cause for not making a complaint within such period] c. no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138".

14.CW1 i.e. Complainant has deposed in his affidavit dated 17.11.08 that the complainant and the accused were residents of the same locality having friendly relations with each other for last many years. In the month of Feb. 2004, the accused approached the deponent and demanded of Rs. 50,000/☐from him and requested to give the amount as friendly loan and assured that the said loan amount would be returned within three months as the accused was in urgent need of money and so keeping in view of the friendly relations, the complainant gave Rs. 50,000/☐in cash to the accused. As per affidavit, in discharge of aforesaid liability the accused issued cheque Ex. CW1/A and the complainant presented the said cheque to his banker i.e. Citi Bank, Delhi on 27.05.2004 but the same was returned unpaid with endorsement of 'account closed' vide cheque return memo dated

28.05.2004. The return memo of both banks have been exhibited as Ex. CW1/B and Ex. CW1/C. The complainant immediately contacted the accused and told the story regarding the dishonour of the said cheque but the accused neither paid nor clear the cheque amount to the deponent inspite of repeated requests and demands made orally and accused flatly used to repay the cheque amount. Finding no other way the deponent got issued a legal notice dated 07.06.2004 Ex.CW1/D through his counsel by registered A.D. Original postal receipt, receipt of UPC and A.D. are CC No. 476/04 8/15 Ex. CW1/E, Ex. CW1/F and Ex. CW1/G respectively. The complainant has deposed that accused is under liability to clear his legal debts towards the complainant.

15.Ld. counsel for accused had contended that name of accused is Govind Singh Bist and not Gopal Singh Bhist as mentioned in the complaint and hence he has no liability against cheque in question.

16.Perusal of the file would show that the said contention was taken by the accused when he appeared before this court and perusal of ordersheet dated 01.10.05 would show that it was submitted by accused that cheque in question bears his signature and after that notice u/s 251 Cr.P.C. was framed against the accused and the name of accused has been mentioned as 'Gopal Singh Bisht or Govind Singh Bisht'. Perusal of the file would further show that no where in the cross examination of CW1 who is main witness of this complaint, suggestion has been put that the cheque in question was not issued by the accused. In statement u/s 313 Cr.P.C. which was recorded on 06.05.09, in response to question no.1, the accused has answered that he has not issued the cheque in question. Perusal of the file would further show that nowhere in his examination in chief the accused has stated that the cheque in question was not issued by him. Neither any other witness or record has been brought which would prove that the cheque in question does not bear his signature. Perusal of Return Memo would show that the ground of dishonour is 'account CC No. 476/04 9/15 closed' and the reason is not that signatures differ or in complete signatures. The bald answer in response to questions put u/s 313 Cr.P.C. is not sufficient to prove that cheque in question has not been issued by accused. It is a fact of common knowledge that one person can have two names but two persons cannot have same signatures. Further, if it happens in rarest of rare cases then the same situation has not been proved in the present matter. If the accused had different signatures then he could have easily brought evidence in respect of the same but the same has not been done in the present matter. Hence, the contention of Ld. Counsel for accused that name of the accused is Govind Singh Bist and not Gopal Singh Bhist does not affect the liability of the accused in respect of cheque in question.

17. Ld. Counsel for accused has contended that the accused was not served with legal notice and acknowledgment due card does not bear his signature. He has further contended that the correct address of accused is not A□5 but it is A□5/575. Perusal of the file would show that AD card has been placed on record which bears the signature and those also have been attested by oath commissioner. Further, postal receipts and receipt of UPC attested by Oath Commissioner are on record whose genuineness has not been questioned by the accused. The address mentioned on the said receipts is H/No. A□5, Giri Marg, near Dr. Gumber Clinic. The accused has not deposed that address mentioned in the legal notice is not the correct address however he has stated that he has not received any legal notice as alleged by the complainant.

CC No. 476/04 10/15 Perusal of the cross examination of CW1 dated 27.03.09 would show that nowhere question/suggestion has been put to the complainant that the address mentioned by the complainant is not the correct address of accused. Further, acknowledgment due card has been placed on record by the complainant and on the other hand no witness has been examined by the accused from Postal Department which would show that the legal notice did not reach to the accused. In his cross examination, the accused has deposed that he and his family members did not receive notice but same was lying in his premises. It is also admitted by accused in his cross examination that the house of the accused is situated at Giri Marg and also the shop of complainant is situated on the same street. Taking into consideration all the facts and circumstances, it is clear that accused was served with legal notice.

18.Ld. counsel for accused has contended that the complainant has failed to show from where the complainant got the amount of fifty thousand and how it was paid to the accused. He has further contended that no Income Tax Return of the complainant has been filed by him on record. Perusal of cross examination of CW1 dated 27.03.2009 would show that it is deposed by complainant that he arranged the money for giving loan to the accused from savings of his salary from job. He has further deposed that at the time of giving loan he was doing job and was a technician and at the time of cross examination he was an engineer. Nowhere in the cross it is disputed that accused was a salarized person earning Rs. 10,000/□pm. He has also stated CC No. 476/04 11/15 in his cross examination in vol. deposition that he was trying his extra income from over time and out of station allowances. The said fact has not been disputed by the accused and neither any witness has been produced for disproving the said fact. Further, there is presumption u/s 139 of Negotiable Instrument Act that unless the contrary is proved, the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability. Hence it was the duty of accused to rebut the presumption that no such amount was taken by him and neither the cheque in question was issued by him in the discharge of his liability.

19.It has been held by the Hon'ble Supreme Court in "K.N. Beena Vs. Muniappan & Anr. Criminal Appeal No. 1066 of 2001 arising out of SLP (Crl.) no. 969 of 2001 that "Under Sections 118, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including a cheque) had been made or drawn for consideration. Under section 139 the court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus in complaints under section 138, the court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused. This court in the case of Hiten P. Dalal Vs. Bratindranath Banerjee reported in (2001) 6 SCC 16 has also taken an identical CC No. 476/04 12/15 view"..... It has been recently held in Rangappa Vs. Sri Mohan in Criminal Appeal No. 1020 of 2010 [Arising out of SLP (Crl.) No. 407 of 2006] by the Hon'ble Supreme Court that 14. In the light of these extracts, we are in agreement with the respondent/claimant that the presumption mandated by Sec. 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (Supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, it is of course in the nature of a rebut table

presumption and it is opened to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested.

20.Perusal of the file would show that in complaint titled as Anil Kumar Vs. Gopal Singh Bisht, a suggestion has been put on behalf of accused that accused came to factory of Anil Kumar and at that time three cheques had been fallen down from the possession of accused in the factory out of which one cheque was given by him to his brother Sh. Sushil Verma and the present complaint has been filed regarding other two cheques. At the time of statement of accused in his defence the accused has stated that he was carrying a folder containing cheque book and one of the cheque was having signature on it. Perusal of the file would show that at the time of framing of notice the accused had admitted his signatures on the cheques in question. At the time of CC No. 476/04 13/15 statement of accused he has denied the issuance of cheques in question. In both the complaint, the accused has denied the signature on cheques in question at the time of statement of accused and all the cheques in both the complaints are three in numbers and the accused has failed to show which one of the cheque was signed by him. This shows that the plea of non issuance of cheque by the accused is not tenable. Further nothing has been placed on record that any complaint was made by the accused to the bank concerned regarding missing of the cheques and to the police for any action. Hence the defence of the accused does not appear believable and that is not sufficient for rebuttal of the presumption provided by Sec. 139 of Negotiable Instrument Act.

21.The cheque in question is dated 22.05.04 and return memo is dated 27.05.04. Legal Notice dated 07.06.2004 has been sent on 08.06.2004 and the present complaint has been filed on 27.07.2004. A period of seven days can be presumed in reaching the legal notice to the accused and hence the present complaint is within limitation.

22.The judgements relied upon by the Ld. Counsel for accused are not applicable on the facts of the present case.

23.In view of the above mentioned discussion, I am of the considered opinion that the complainant has proved his case against the accused beyond CC No. 476/04 14/15 reasonable doubts. All the ingredients of Sec. 138 of Negotiable Instrument Act have been duly proved on record. On the other hand accused has failed to rebut the presumption and prove his defence on preponderance of probabilities. Accordingly, accused is convicted for the offence u/s 138 of Negotiable Instrument Act.

24.Put up for consideration on point of sentence on 16.11.11. Copy of this order be supplied to the accused free of cost.

Announced in the open court
on 03.11.2011

(DEVENDER KR. GARG)
MM/KKD/Delhi

CC No. 476/04