

Shri Lal Chand vs . Shri Ram Bakash on 19 December, 2022

Shri Lal Chand Vs. Shri Ram Bakash

IN THE COURT OF IN THE COURT OF MS SHIVANGI MANGLA:
MM DC-02:
NORTH-WEST DISTRICT ROHINI, NEW DELHI.

CC NI ACT 99/2021

Shri Lal Chand Vs. Shri Ram Bakash

Name of complainant	:	Shri Lal Chand S/o Shri Ram Surat R/o H.No. P-1/82, Mangolpuri, Delhi 110083
Name of Accused	:	Shri Ram Bakash S/o Shri Prabhu Dayal, R/o P-8/146-147, Mangolpuri, Delhi 110083

Offence complained of	:	138 NI Act
Plea of accused	:	Not guilty
Arguments heard on	:	05.12.2022
Date of judgement	:	19.12.2022
Decision	:	ACQUITTAL

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JUDGEMENT

1. Vide this judgement, I shall decide the present matter , CC No. 99/2021 filed by Shri Lal Chand against the dishonour of the cheque bearing no. 008606 dated 20.07.2020 for Rs. 5,00,000/- drawn on Axis Bank ltd. Vasant Vihar, New Delhi (henceforth the cheque in question).

2. Briefly stated, the facts as alleged in the complaint are that the complainant Shri Lal Chand and the accused Ram Bakash are known to each other for long and share cordial relations with each other. It is stated that in the month of August 2018, accused approached complainant for a friendly loan of Rs. 5,00,000/- with assurance to return the said loan amount within six months. It is further stated that after expiry of period of six months, when complainant contacted accused , he avoided him on one pretext or the other and later to discharge his liability, accused issued a cheque bearing no. 008606 dated 20.07.2020 for Rs. 5,00,000/- drawn on Axis Bank Ltd. Vasant Vihar, New Delh in favour of the complainant. On presentation, the said cheque was returned as unpaid as dishonoured with remarks "Account Closed" vide returning memo dated 05.10.2020. Thereafter, complainant contacted the accused about the factum of dishonour of cheque and demand the borrowed amount but the accused did not pay the same.

3. Thereafter, complainant sent a legal notice dated 28.10.2020 to the accused through registered AD calling upon him to pay the loan amount. It is the case of the complainant that despite service/receipt of the notice, the accused failed to repay the amount within 15 days. Hence, the present complaint.

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4. The present complaint was filed within the limitation period.

5. On appearance of accused, notice of accusation u/s. 251 Cr.PC was framed upon the accused to which he pleaded not guilty and claimed trial. He stated that the cheque belongs to him and bears his signature but the contents were not filled by him. Accused disputed the receipt of any legal demand notice by him. It was further stated by the accused that "I borrowed a sum of Rs. 50,000/- from the complainant which I have already paid back . I contacted complainant to return the cheque in question but he did not return the same."

6. To prove his case, the complainant adopted his pre-summoning evidence affidavit and has relied upon following documents:

- 1) Original cheque Ex. CW-1/1
- 2) Original bank returning memo Ex. CW-1/2
- 3) Copy of legal notice dated 28.10.2020 Ex. CW-1/3
- 4) Original postal receipt Ex. CW-1/4
- 5) Printed copy of internet generated tracking report Ex. CW-1/5

7. Application u/s.145(2) NI Act was moved on behalf of the accused, which was not objected to by Ld. Counsel for the complainant and thus the said application was allowed. Thereafter, the CW-1/ Complainant was examined in chief and cross examined in part on 02.12.2021. the cross examination of CW-1 was deferred due to want of certain document. Then again, CW-1 was cross examined in length on 22.12.2021 and the cross examination was again deferred due to paucity of time. Further on 16.02.2022 , CW-1 was again called for remaining Cross examination. And thereafter, the CE stood closed.

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Shri Ram Bakash

8. Statement of accused u/s.313 Cr. P.C was recorded on 16.02.2022. thereafter the matter was fixed for DE.

9. Initially, the Ld. Counsel for the Accused filed the list of defence witnesses, but later stated that accused does not wish to step into the witness box and therefore, he dropped the accused from the list of witnesses. It was further stated by Ld. Counsel for Accused "that since he is admitting purchase of document purported to be proved by summoning DW-3, there is no requirement for summoning the said witness. It was further submitted by Ld. Counsel for accused that he wished to examine DW-3 only to prove the purchase of stamp paper". And accordingly, 3 rd witness ie. Record clerk along with details of stamp paper of Rs. 50/- bearing no.IN-DL448764927837580 dated 3rd May 2016, at 3;43 pm from revenue department, Delhi, was dropped from the list of defence witnesses and the matter was fixed for examination of DW-1/Dhirender kumar Rai s/o Sh. Shiv Murat Rai. DW-1/Dhirender Kumar Rai was examined in chief and cross examined and discharged on 19.05.2022. then the matter was next fixed for final arguments, which were heard on 05.12.2022.

10. I have heard the counsels for both the parties at length, considered the evidences and the arguments led by them carefully and have perused the court record thoroughly.

INGREDIENTS OF OFFENCE AND DISCUSSION

11. Before going into the facts of the present case, it would be apposite to discuss the legal standards required to be met by both sides. In order to establish Digitally CC NI ACT 99/2021 Page No. 4 of 24 signed by SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:08:37 +0530 Shri Lal Chand Vs. Shri Ram Bakash the offence under Section 138 of NI Act, the prosecution must fulfil all the essential ingredients of the offence, as highlighted below:

1st Ingredient: The cheque was drawn by a person on an account maintained by him/her for payment of money and the same is presented for payment within a period of 3 months from the date on which it is drawn or within the period of its

validity;

2nd Ingredient: The cheque was drawn by the drawer for discharge of any legally enforceable debt or other liability, 3rd Ingredient: The cheque was returned unpaid by the bank due to either insufficiency of funds in the account to honour the cheque or that it exceeds the amount arranged to be paid from that account on an agreement made with that bank;

4th Ingredient: A demand of the said amount has been made by the payee or holder in due course of the cheque by a notice in writing given to the drawer within thirty days of the receipt of of the dishonour of cheque from the bank; and 5th Ingredient: The drawer fails to make payment of the said amount of money within fifteen days from the date of receipt of notice.

12. The accused has admitted his signatures on the cheque in question at every stage; from the notice u/s.251 CrPC to his statement under U/s 313 CrPC.

In Basalingappa v Mudibasappa (2019) 5 SCC 418, Division Bench of Hon'ble Supreme Court summarized the principles enumerated by it in its earlier decisions as follows:

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(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden."

13. Thus, though the initial presumption is in favor of the holder of the cheque, the drawer can dispel that presumption. However "the rebuttal does not have to be conclusively established but

such evidence must be adduced before CC NI ACT 99/2021 Page No. 6 of 24 Digitally signed by SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:08:52 +0530 Shri Lal Chand Vs. Shri Ram Bakash the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man..."

14. Whether in a given case, the accused has been able to dislodge the initial presumption is a question of fact. Having said that, it deserves mentioning that "apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue. " as held in case of Kumar Exports v Sharma Carpets (2009) 2 SCC 513.

15. The accused has already admitted his signature upon the cheque in question and once the foundational facts that the cheque in question bears the signatures of the accused and the same have been drawn on account maintained Digitally signed by CC NI ACT 99/2021 Page No. 7 of 24 SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:09:00 +0530 Shri Lal Chand Vs. Shri Ram Bakash by him are established a factual base is established to invoke the presumption of cheque having being issued in discharge of a legally recoverable debt and drawn for good consideration arises by virtue of Section 118(a) r/w Section 139 of NI Act. It is a mandatory presumption though the accused is entitled to rebut the said presumption. The accused can discharge his burden by demonstrating the preponderance of probabilities coming in its way.

16. Therefore, in the present case, the onus of proof is now upon the accused to raise a probable defence and to rebut the presumption of the existence of a legally enforceable debt arisen in favour of the complainant. It is now to be examined as to whether the accused has brought any material on record dislodging the presumption which meets the standard of preponderance of probabilities.

Now I shall be discussing all the defences of the accused one by one - Receipt of legal demand notice by the accused:

17. The accused has stated in his plea of defence under section 251 CrPC that he did not receive the legal demand notice. The accused took the same stand in his statement u/s 313 CrPC. Presumptions regarding the successful delivery of documents sent by the post (whether registered or not) can be raised by the court as per the provisions enshrined in Section 27 of the General Clauses Act r/w Section 114 of the Indian Evidence Act (hereinafter referred to as 'IEA').

18. The Hon'ble Supreme Court in the case of Alavi Haji vs. Palapetty Muhd. & Anr (2007) 6 SCC 555 wherein the Hon'ble Court has opined that section 27 of the General Clauses Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. Unless and until the contrary is proved by the addressee, service of notice is Digitally signed by SHIVANGI SHIVANGI MANGLA CC NI ACT 99/2021 Page No. 8 of 24 MANGLA Date:

2022.12.19 16:09:07 +0530 Shri Lal Chand Vs. Shri Ram Bakash deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

19. The accused has merely denied the receipt of legal notice. However, he has always mentioned the same address at the time of notice framing, in his surety bonds and also at time of recording of his statement u/s.313 CrPC. Moreover, accused appeared on summons being issued on the same address. Further, he has never led any cogent evidence to prove that notice was not delivered to him. Therefore, in the light of the above discussion, this court is of the considered view that a presumption regarding delivery of legal demand notice can be raised if the notice is sent through post on correct address of the accused. Hence, in the present case, since, the address of the accused on which legal demand notice is not disputed, the said address seems to be correct. Legal demand notice was sent on the correct address of the accused through registered post/AD, and, therefore, a presumption can be raised about its successful delivery.

Accused has repaid the loan amount of Rs.50,000/-:

20. Accused has taken a defence that he got issued a loan of Rs. 50,000/- from the complainant which he has already repaid in his plea of defence u/s.251 Crpc. The same defence was reiterated by the accused in his application u/s.145(2) and in his statement recorded u/s.313 CrPC, however, the accused has never showed any proof of such repayment throughout the entire trial. DW-1 also stated in his chief examination before court that the accused has returned the sum of Rs.50,000/- in his presence but it is surprising that when he exactly remembers the date of grant of loan of Rs.50,000/- to accused, he is totally unable to recall any date, month or even year of repayment of said amount by Digitally signed by CC NI ACT 99/2021 Page No. 9 of 24 SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:09:15 +0530 Shri Lal Chand Vs. Shri Ram Bakash accused. He didn't even spoke about the mode of repayment of said amount by the accused whether it was in cash or through any account transfer.

21. Mere bald assertions could not serve the purpose of accused rather there should be some cogent and reliable evidences which support his case on the basis of preponderance of probabilities.

Accused asked for return of his cheques:-

22. The accused has put up his case as that when he took the loan of Rs.50,000/- from the complainant, he issued 2 blank cheques for security purpose in May 2016. and when he repaid the loan amount of Rs.50,000/- to the complainant, he demanded his cheques back but the complainant kept avoiding him on one pretext or the other. However, no question was put to CW-1 in his cross examination regarding the return of said cheques, when it being the main basis of defence raised by accused in his application u/s.145(2) NI Act.

23. Moreover, in the later stages of the trial, it appears that the accused has himself forgot about his cheques and his defence was restricted to only the cheque in question which is to surprise of this court.

24. The same plea was also stated by DW-1 in his chief examination that "the accused asked for return of his cheque in question in his presence but complainant told him to return it as and when the same is founded by his wife." Again, nothing was mentioned regarding second cheque being issued as security cheque by DW-1 who is stated to eye witness to the transaction of loan lending and demanding of return of cheque between complainant and accused.

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2022.12.19 CC NI ACT 99/2021 Page No. 10 of 24 16:09:23 +0530 Shri Lal Chand Vs.
Shri Ram Bakash Dispute regarding loan agreement and stamp paper of Rs.50/-
dated 03.05.2016 :-

25. The entire plea of defence of accused is mentioned on the loan agreement and stamp paper dated 03.05.2016 which is marked as "Ex. Mark A" during the cross examination of the CW-1/Complainant, the accused tried to build a story that the said loan was granted to accused by the complainant in year 2016 for which stamp paper of Rs.50/- was also bought by the complainant and one agreement to this effect was also executed between the parties to which DW-1 was the witness. Also, for the purpose of bringing the said document on record, adjournment was sought by Ld. Counsel for accused. However, it is again to surprise of the court that no reference was ever made by the accused regarding the said execution of said loan agreement and stamp paper in his plea of defence u/s.251 CrPC. Neither any mention regarding the loan transaction was made by the accused in year 2016 at time of notice framing. However, in the application framed under s.145(2) by the Ld. Counsel for the Accused only the fact of grant of loan in 2016 is mentioned and again no mentioning regarding the execution of any agreement and stamp paper is made. For the first time the reference was made regarding the said loan agreement and stamp paper was in the cross examination of CW-1 on 02.12.2021, however again the cross was deferred on the account of non availability of the said document with the Ld. Counsel for the Accused. No reasonable prudent person would ever forget to mention or bring the document material to his case when his entire

defence is based on plea of loan borrowing in the year 2016 and not in year 2018. Moreover, the original loan agreement and the stamp paper is never produced before the court on the ground that the same is in possession of the complainant and merely the photocopy of the said agreement is relied upon which was marked as "Ex.mark A" despite the CW-1 has clearly denied the execution of same or the same being Digitally signed by SHIVANGI CC NI ACT 99/2021 Page No. 11 of 24 SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:09:30 +0530 Shri Lal Chand Vs. Shri Ram Bakash in his possession. For the first time, the reference was made by the accused in regard to Ex.Mark A was in his statement under section 313 CrPC, wherein he stated that "the son of the complianant bought the stamp paper and the complainant also accompanied him". Here, again accused failed to mention any date on which the said loan agreement was executed between them. It is quite difficult to believe that the prudent person would not mention about the fact elaborately or in detail on which he relies for his defence and the transaction of Rs. 50,000/- is not such that a aperson executing it would forget about it. However, the exact date was stated by the eyewitness ie. DW-1 to transaction that the said agreement was executed between accused and complainant on 03.05.2016.

26. Moreover, despite clear denial of execution of any loan agreement and purchase of any stamp paper of Rs.50/- by the complainant in cross examination and the mentioning of Record clerk to prove the purchase of stamp paper as witness no.3 in list of defence witness , the said witness was not called by Ld. Counsel for accused stating that the purchase of said document is admitted by the complainant. Had been so, then he would not have incorporated the record clerk as his witness no. 3 in list of witnesses prepared by him after completion of cross examination of CW-1.

27. The ld counsel has mentioned in his written arguemnts that the complianant has admitted the purchase of stamp paper in ordersheet dated 12.04.2022, when the same is not recorded even in the words of complainant and same being denied multiple times by the complaianant.

28. Moreover, the said Ex.Mark A appears to be false, fabricated and an afterthought, as the same doesnot bear any signatures or passport size photographs on the first page.

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29. It appears that the accused side has taken advantage of complianant being a blind person and the said document is prepared afterwards with some forged thumb impressions which are called to be of complaianant. However, Ld. Counsel for the complainant has failed to challenge on this aspect. Moreover the accused was not called as defence witness who would have been in a better position to explain this fact.

30. Thus, in totality of above it can be said that the said document Ex.Mark A has not been proved by the accused even on preponderance of probabilities and the document has failed to support his version of defence and the same appears to have been an afterthought.

Non examination of accused as defence witness, testimony of DW- 1/Dhirender kumar Rai and defence of security cheque:-

31. It was stated by the Ld. Counsel for accused that the accused did not wish to step into the witness box despite his name being mentioned in the list of defence witness.

Section 315(1) Crpc is produced for reference-

"Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial;

Provided that--

1. he shall not be called as a witness except on his own request in writing;

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2. his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial."

32. The Ld. Counsel for the compliannat has placed reliance on the judgement of V.S.Yadav v. Reena (2010) , of Hon'ble Delhi High Court "It must be borne in mind that the statement of accused under Section 281 Cr. P.C. or under Section 313 Cr. P.C. is not the evidence of the accused and it cannot be read as part of evidence. The accused has an option to examine himself as a witness. Where the accused does not examine himself as a witness, his statement under Section 281 Cr. P.C. or 313 Cr. P.C, cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused was truthful. In the present case, the accused in his statement stated that he had given cheques as security. If the accused wanted to prove this, he was supposed to appear in the witness box and testify and get himself subjected to cross examination. His explanation that he had the cheques as security for taking loan from the complainant but no loan was given should not have been considered by the Trial Court as his evidence and this was liable to be rejected since the accused did not appear in the witness box to dispel the presumption that the cheques were issued as security. Mere suggestion to the CC NI ACT 99/2021 Page No. 14 of 24 Digitally signed by SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:09:53 +0530 Shri Lal Chand Vs. Shri Ram Bakash witness that cheques were issued as security or mere explanation given in the statement of accused under Section 281 Cr. P.C., that the cheques were issued as security, does not amount to proof. Moreover, the Trial Court seemed to be obsessed with idea of proof beyond reasonable doubt forgetting that offence under Section 138 of N.I. Act was a technical offence and the complainant is only supposed to prove that the cheques issued by the respondent were dishonoured, his statement that cheques were issued against liability or debt is sufficient proof of the debt or liability and the onus shifts to the respondent/ accused to show the circumstances under which the cheques came to be issued and this could be proved by the respondent only by way of evidence and not by leading no evidence."

33. Thus the submission of the Ld. Counsel for complainant that the none examination of the accused as defence witness is enough to convict him is highly unsustainable as it is not mandatory for accused to step into witness box.

34. Moreover, it was noted by Hon'ble Delhi High Court in its judgement of Suresh Chandra Goyal v. Amit Singhal, that till the debts /legal liability subsists, even the security cheques would attract the penal provisions u/s.138 NI Act.

35. However, the accused has examined DW-1/Dhirender Kumar Rai as defence witness. The reference to presence of DW-1 during loan transaction in year 2016 was first time made by the Ld.Counsel for the accused during the cross examination of CW-1 on 22.12.2021. Nothing has been mentioned with respect to said witness ever before by the accused in his notice u/s.251 crpc , no CC NI ACT 99/2021 Page No. 15 of 24 Digitally signed by SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:10:01 +0530 Shri Lal Chand Vs. Shri Ram Bakash mention ever done in application u/s.145(2). In his deposition , CW-1 has maintained his stand that he does not know any such person DW-1 or that any such person DW-1/Dhirender kumar Rai accompanied him in withdrawal of amount or that any such person helped him in purchase of his house.

36. In his examination in chief, DW-1/Dhirender kumar Rai has deposed that he knew the complainant from childhood. However, being known to complainant since childhood days, and being living at a distance of 25-30 km from the house of complainant, he was unable to tell the name of village of complainant. This testimony of DW-1 is filled with certain suspicions that being known to the compliananat for such long time, how is DW-1 not aware of the name of the village of complainant moreover when it is his deposition that he accompanied the complainant along with his son and wife for withdrawl of money in 2016, he was witness to the loan agreement in 2016, he helped complainant in arranging his accomodation. No reasonable prudent person would forget or not know the name of colony or the residence of someone whom he is accompanying everywhere.

37. It has been further deposed by the DW-1 that he helped complainant bought his new house in which he is currently residing but again to the surprise of this court, DW-1 failed to recall the exact house number of complainant.

38. DW-1 accurately remembered the date of execution of Ex.Mark A on 03.05.2016 but he doesnot know the name of village of complainant where he must have visited several times as being known to complainant and being his supporter in every transaction. DW-1 exactly remembered the house no. of his maternal uncle and aunt but he does not know anything about the house in Digitally signed by CC NI ACT 99/2021 Page No. 16 of 24 SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:10:09 +0530 Shri Lal Chand Vs. Shri Ram Bakash which he helped complainant arranging and finding the accommodation. If this is his version, then the complainant being blind must have asked him about the surroundings of the new house which they have come to purchase, but nothing has been mentioned in this regard by the DW-1 in deposition. Thus, it can be said that testimony of DW-1 suffers from various lacunas.

Legal enforceable debt or liability:-

39. In the present case, the complainant by way of an affidavit led his own evidence testifying that cheque was issued to him after he had advanced a loan of Rs. 5,00,000/- to the accused. The cheque in question, dishonour memo of cheque and legal demand notice were exhibited on record.

40. The complainant/CW-1, in his cross examination revealed that the loan of Rs.5,00,000/- was advanced by to the accused by withdrawing the said amount from his brother in law Sudama on 12-13.08.2018, to whom he gave the said amount in 2016. He further deposed in his cross examination that he had given the money to the accused on 12.08.2018.

41. CW-1/Complainant deposed that "I withdrew sum of Rs.4,70,000/- in first week of May 2016 for the purpose of handing over the same to my brother in law Sudama". He further deposed that "a sum of Rs. 4,60,000/- was withdrawn by my son in May 2016". And thereafter, a sum of Rs.5,00,000/-was advanced as loan to accused on 12.08.2018. It was further mentioned by him that at he is not aware with certainty whether the exact date of lending of loan to accused has been mentioned by his counsel in his compliant and evidence affidavit. Later in his deposition, CW-1 stated that " I was working in Gian International, G-7 Udyog Nagar and I had arranged the sum of Rs. 5 lacs after withdrawing the Digitally signed by SHIVANGI CC NI ACT 99/2021 Page No. 17 of 24 SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:10:16 +0530 Shri Lal Chand Vs. Shri Ram Bakash same from my PPF/EPF account. I am unable to recall the exact date but same was withdrawn by me in May 2016. I can produce the relevant bank account statement. The amount of

Rs. 4,60,000/- mentioned by me earlier in my deposition is the same amount which is being referred by me here. It is wrong to suggest that I had advanced - sum of Rs. 4,60,000/- to my brother in law namely Sudama. Vol. I had advanced a sum of Rs. 5 lacs to my brother in law namely Sudama in year 2016 who returned the same in year 2018. After receiving the same, I advanced the loan of Rs. 5 lacs to the accused. My brother in law namely Sudama returned the sum of Rs. 5 lacs somewhere around 12-13.08.2018".

42. Thus it can be said that the deposition of complainant/CW-1 is not in consonance. He has not been able to state clearly as to how much amount was lended by him in year 2016 to his brother in law and has been changing his statement every then. He has also not been to state with clarity what was the date of advancement of loan to accused.

43. CW-1stated that there was no written loan agreement between him and his brother in law pertaining to said transaction as his brother in law used to borrow money from each other. Thus, CW-1 has failed to furnish any document/evidence that there was any money transaction between him and his brother in law Sudama. Moreover, in support of his version , Sudama was examined by the complainant.

44. CW-1/Complainant further deposed that "at the time of advancement of loan of Rs. 5 lacs besides me and accused, my wife and my son were also present and no one else."

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45. He further go on to depose, "The cheque in question was handed over to me at my residence in presence of my wife and my son. All the particulars on the cheque were already filled. However, same were not filled in my presence. It is wrong to suggest that the particulars on the cheques were not filled by me. I am blind therefore, I cannot tell the denomination/currency which was used to advance the loan of Rs. 5 lacs to the accused. My son accompanies me for the purpose of withdrawing money. My son was also accompanying me at the time of handing over the cheque in question and he informed me that particulars on the cheque are already filled. I had went alongwith my son for purpose of withdrawing sum of Rs. 4,60,000/- from the bank. The balance amount was arranged from the resources then available at home. I cannot say with certainty whether the fact that the loan amount of Rs. 5 lacs was advanced by me through my son has been mentioned in my complaint or evidence affidavit. I have not arrayed my son as witness in the present matter."

46. In view of above statement, it can be said that the son and the wife of the complainant were witnesses to the loan lending transaction and to the transaction of issuance of cheque by the accused. Moreover, it can be understood that the complainant being blind and illiterate is supported and accompanied by his son everywhere and it is the son who is reading and explaining contents of every document ,if any, to the complainant. However, despite that nothing has been mentioned about the presence of son and wife of complainant in the compliant and in the evidence affidavit. And neither the son nor the wife of the complainant has been examined by the complainant in support of his version.

47. CW-1 has further deposed that "I know the accused for last 30 years. I had no money transactions ie. Borrowing or lending money with the accused CC NI ACT 99/2021 Page No. 19 of 24 Digitally signed by SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:10:37 +0530 Shri Lal Chand Vs. Shri Ram Bakash before the year 2018." It was further deposed that " I have not taken anything as security from the accused at the time of transaction in question in the year 2018. I had asked the accused the purpose of borrowing money. VOL: the accused had stated that he needs the money urgently. I had asked the accused to explain the urgency but accused refused to disclose the same. It is wrong to suggest that I had not asked the accused his purpose of seeking the loan from me. However, I am unable to state with certainty whether the purpose of borrowing money has been mentioned by me in the complaint."

48. The testimony of CW-1 does not inspire confidence ; Firstly because no reasonably prudent person would advance loan of Rs. 5,00,000/- in cash without executing any written document or taking security for the same. Secondly, the complainant has stated to be knowing accused for last 30 years but nothing has been mentioned with regard to relations shared between them. Merely mentioning of fact that they share cordial relation in the complaint, no other cogent evidence has been brought on record to prove the relationship and kind of relationship shared by two. Thirdly, Merely being knowing any person for long time does not warrant to lending of loan of huge amount of Rs.5,00,000 in cash without even knowing the purpose for which the said loan is required. It is hard to believe that a man who is fully blind, illiterate , totally dependent and having no earlier money transaction with accused would lend a loan of Rs.5,00,000/- in cash without even asking for the purpose of requirement of such loan, without taking documentary proof regarding the same, without taking anything as security in lieu of said loan.

49. CW-1 has deposed that "I earn rental income of Rs.20,000/- per month approximately. Further I receive pension of Rs. 1608/- from PF per month and also another pension of Rs.2500/- per month. The rental premises from which I Digitally CC NI ACT 99/2021 Page No. 20 of 24 signed by SHIVANGI SHIVANGI MANGLA

MANGLA Date:

2022.12.19 16:10:44 +0530 Shri Lal Chand Vs. Shri Ram Bakash receive income is in name of my wife. I have two properties each measuring into 25 sq. yard from which I receive rental income (vol. one of these properties is jointly owned by me and my wife)."

50. In this regard, reliance is placed upon the judgment of Apex Court in case of APS Forex Services P. Ltd. vs. Shakti International Fashion Linker and Ors (2020) 12SCC 724 wherein it was laid down that:-

"8.4. We are of the view that whenever the accused has questioned the financial capacity of the complainant in support of his probable defence, despite the presumption under Section 139 of the NI Act about the presumption of legally enforceable debt and such presumption is rebuttable, thereafter, the onus shifts again the complainant to prove his financial capacity and at that stage the complainant is required to lead the evidence to prove his financial capacity, more particularly when it is a case of giving loan by cash and thereafter issuance of a cheque...." "

51. Moreover, complainant did not disclose any reason as to why he had to gone through the painful exercise for arranging funds from various sources not for his own personal needs or requirement but only for giving loan to a third person i.e. accused. The complainant has failed to mention anything regarding the bonding shared by him with the accused . In ordinary course of human conduct, no person who is blind and dependent would take such recourse of lending such huge amount saved by him throughout his life to someone without any documentary proof that too at his old age of 65 years, just to give a friendly Digitally CC NI ACT 99/2021 Page No. 21 of 24 signed by SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:10:52 +0530 Shri Lal Chand Vs. Shri Ram Bakash loan to a person. Complainant failed to show the compelling reasons for adopting such a course of action.

52. In Kajal vs. Vikas Marwah (Crl.Appeal No. 870/2003 date of decision 27.03.2014), Hon'ble High Court of Delhi observed as follows:-

"The complainant/appellant did not produce either of her sisters or Mr. Jacky to prove the loan alleged to have been taken by her from them. Therefore, her deposition in this regard remained unsubstantiated. Even otherwise, it would be difficult to accept that the complainant would have raised loan from several persons not for her personal need, but for advancing loan to the respondent from time to time. In the normal course of human conduct, no one is likely to take obligation of others just to give loan to another person, unless he /she obtains a substantial advantage, by undertaking exercise of this nature."

53. Therefore, as far as the second ingredient is concerned, the accused raised a probable defence to rebut the presumption.

CONCLUSION

54. In light of the aforementioned discussion, the complainant has failed to prove the existence of any legal debt or liability in his favour and therefore has failed to prove all the essentials ingredients of section 138 NI Act.

55. It is a settled position of the law that the case of the complainant should stand on its own legs. It cannot take advantage of the weakness of the defence, nor can the court, on its own make out a new case for the prosecution and Digitally signed by SHIVANGI SHIVANGI MANGLA CC NI ACT 99/2021 Page No. 22 of 24 MANGLA Date:

2022.12.19 16:11:00 +0530 Shri Lal Chand Vs. Shri Ram Bakash convict the accused on that basis. If defence version is incorrect, it does not mean that the prosecution version is necessarily correct.

56. In the present case, complainant failed to prove his case against the accused beyond reasonable doubt. Thus, in view of the totality of the circumstance and the settled legal positions, the case attempted to be built by the complainant, appears to be suffering from fatal infirmities so much so, it goes directly to the root of the case and shakes the very edifice on which the case of the complainant rests. It is also relevant to mention here that it is of paramount importance to demand evidence of unambiguous, impeccable and of unimpeachable in nature so as to entail criminal conviction of the accused and which the complainant has failed to bring.

57. In order to rebut the presumption of Section 139 of NI Act, accused is not required to bring evidence but should adduce sufficient cogent evidence or can rely upon the circumstances which shows the probability of non existence of consideration. Accused has to prove his defence on the scale of preponderance of possibilities. In the present matter, the accused has been able to raise a reasonable probable defence by punching holes in the case of complainant itself on the basis of the material already brought on record by way of cross- examination of the complainant, which has created doubt about the existence of a legally enforceable debt or liability, and has been able to rebut the presumption under Sections 118 and 139 of the Act and the reverse onus cast upon him has been discharged.

58. Since, the accused has rebutted the statutory presumption, the onus again shifts back upon the complainant. Now, the presumptions under Section 118 and 139 of the Act will not again come for the rescue of the complainant. In the Digitally signed by CC NI ACT 99/2021 Page No. 23 of 24 SHIVANGI SHIVANGI MANGLA MANGLA Date:

2022.12.19 16:11:08 +0530 Shri Lal Chand Vs. Shri Ram Bakash instant case, complainant has failed to discharge the burden of proof and could not prove the case beyond reasonable doubt.

59. Accordingly, the accused Shri Ram Bakash is acquitted of the offence under Section 138 of NI Act. File be consigned to record room after necessary compliance.

Announced in the open Court

On 19.12.2022.

Digitally
signed by
SHIVANGI

SHIVANGI MANGLA
MANGLA Date:
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(Shivangi Mangla)
(MM(NI) Digital court02)
NorthWest, Rohini
New Delhi/19.12.2022

Note : this judgement contains 24 Pages and each page is signed by the undersigned.