

Gulshan Arora ...Complainant vs . on 6 October, 2020

IN THE COURT OF MS AMARDEEP KAUR
MM (NI ACT-03): PHC: NEW DELHI

Judgment

In the matter of:
CC No.: 54753-2016

Gulshan Arora
S/o Late Sh. R. C. Arora
CB385B, Ring Road,
Naraina New Delhi 110028
Through counsel Sh. Alok Pandey

...Complainant

Vs.

Alka Kaushal
W/o Sh Ravee Kaushal
R/o Bungalow No. 37C, Royal Hills,
C.G.H.S., New Dindoshi Mahada Colony,
Gorefoan (E), Mumbai 400063
Through counsel Ms. Tara Ganju

...Accused

Date of Institution of Complaint: 22.02.2010
Offence Complained of : u/s 138 N.I. Act
Plea of Accused : Not Guilty
Date of Final Arguments Heard : 04.09.2020
Decision : Conviction
Date of Decision : 06.10.2020

BRIEF REASONS FOR THE DECISION OF THE CASE

1.

Brief facts of the case as alleged in the complaint is that the parties shared friendly relations and the complainant provided financial assistance to the accused from time to time for investment in her TV Serials and film projects upon assurance that the same shall be repaid by accused in some time. Against such friendly loan, the accused issued an earlier cheque which upon presentation was dishonored and the complainant filed a criminal complaint against the accused. It is pleaded that during such proceedings, the parties entered into a settlement/compromise whereby the accused handed over the present cheque bearing no. 920066 dated 26.12.2009 drawn on ICICI Bank, Goregaon Branch, Mumbai for Rs. 15,00,000/ in favour of the complainant. However, upon presentation the said cheque was returned dishonored for reason "insufficient funds" vide return memo dated 31.12.2009. The complainant sent a legal notice dated 05.01.2010 demanding the amount of the cheque. However, the accused did not make any payment qua the impugned cheque

within 15 days of the stipulated period. Therefore, the present complaint under Section 138 of the Negotiable Instruments Act, 1881 was filed.

2. After perusal of material on record, prima facie case was made out and cognizance was taken vide order dated 22.02.2010. Accused appeared on summons and secured bail. She was afforded an opportunity to cross examine the complainant and thereafter CE was closed vide order dated 10.05.2019. All incriminating circumstances were put to the accused and her statement under section 281(1) read with section 313 CrPC was recorded on 22.08.2019. The accused also led defence evidence wherein she examined her husband Sh. Ravee Kaushal as DW-1. Further, record from ROC was summoned and the witness (Junior Technical Officer Ms. Taranjeet Kaur Malhotra) from ROC was examined as DW-2. Thereafter, DE was closed on 12.03.2020.

3. While the matter was fixed for final arguments, ld. counsel for complainant filed an application under section 311 CrPC for taking on record certain additional documents. However, the same was rejected by this court vide order dated 28.08.2020. Learned Counsel for complainant then approached the Honorable High Court of Delhi under Section 482 CrPC to challenge the said order. Honorable High Court of Delhi vide order dated 16.09.2020, granted the complainant a limited relief and directed the present court to take into consideration order dated 20.08.2009 passed by Ld. MM, Rohini Courts in another matter between the parties in CC No. 2152/1/o 8, PS Prashant Vihar, titled "Gulshan Arora Vs Alka Kaushal while adjudicating the present matter. The certified copy of the said order was submitted to the court by the complainant and was taken on record as Ex. C1. An additional statement under section 313 CrPC read with Section 281 CrPC was recorded on 30.09.2020. No further defence evidence was led and matter was therefore fixed for Judgement.

Defence of the accused

4. Though the accused has admitted her signatures on the impugned cheque, she consistently denied the claim of the complainant on the ground that the cheque in question was given/handed over to one Mr. Prashant Mamgain as security cheque against a friendly loan which she has already repaid to him and his associates upon his instructions, in various installments between the year 2003-2012. However, Mr. Prashant Mamgain did not return her security cheques. It is her apprehension that the present complainant in connivance with his friend and business partner Mr. Prashant Mamgain has filed this false and fabricated complaint simply to harass the present accused. Further, she also denied receiving any legal demand notice from the complainant.

5. The accused has relied in her defence upon documents tendered by her husband Sh. Ravee Kaushal who was examined on oath as witness DW-1. This includes Ex DW1/1 (OSR) which is a Memorandum of Understanding dated 22.07.2002, between Alka Kaushal (accused) and Mr. Prashant Mamgain executed on her behalf by her husband DW1 Sh Ravee Kaushal (authorized by a Letter of authority dated 19.07.2002 Ex DW1/2 (OSR)) detailing the business dealing between the two. She has further relied upon Ex DW 1/3 which is the brochure of a TV serial titled "Kho Gayeen Manzilen" wherein the said Mr. Prashant Mamgain is credited as the financial advisor to further explain the professional relationship between the two. Lastly the accused relied upon Ex DW1/4 (Colly) (OSR) which is a set of counter of pay slips and Ex DW1/5 which is a summary of repayment

in support of her submission that she had repaid Rs 45,87,700/- to the said Mr. Prashant Mamgain in lieu of her liability towards him. Further the accused also relied upon the record tendered in by witness from ROC DW-2 in support of her submission that the complainant never had the requisite financial capability to extend the alleged loan of Rs 15,00,000/-.

Arguments advanced by the counsels

6. Ld. counsel for accused while pointing out various shortcomings and contradictions in the case of the complainant submitted that the complainant has made vague submissions in his complaint and no details have been furnished as to when, where and how the alleged friendly loan was advanced. Again while the complainant has pleaded in para 3 of the complaint that the present cheque (Ex CW1/1) was issued in lieu of a settlement/compromise in an earlier proceeding between the parties, no details of the same have been cited in the complaint nor any document in support of his submissions have been annexed with complaint or placed on record at the stage of post summoning, complainant's evidence or confronted at the stage of defence evidence. It is her submission that even otherwise, a cheque given in settlement/compromise upon dishonor cannot give rise to a fresh cause of action i.e. a second complaint in lieu of a cheque issued in terms of a compromise is not maintainable. The defence has solicited support from judgement of Honorable Supreme Court in case titled Lalit Kumar Sharma and Anr. Vs. St. of UP and Anr (2008) 5 SCC 638 and Judgment of Honorable High Court of Delhi in case titled Thakur Arora vs State and Anr. (2009) SCC Online Del 403.

7. Further, while the complainant alleges to have extended a friendly loan for Rs 10,00,000/-, his financials as deposed by him on oath as witness CW-1, his earnings from his job as a director at Pioneer Freight Services Private Ltd as reflected by the record of ROC, coupled with his reluctance to produce his ITR statements does not support his allegations. Ld. counsel submitted that the complainant himself has deposed that he earned around Rs 40,000/- in the year 2019, therefore it is highly improbable that he earned enough and had the capability to advance a friendly loan without executing any written document, way back in 2007-2009.

8. Ld. counsel further argued that the complainant is a close friend and business associate with Mr. Prashant Mamgain who has also appeared along or on behalf of complainant on some occasions during the hearing of the present matter. The impugned cheque was handed over by the accused to the said Prashant Mamgain and has already been re-paid for. The present complaint is only a proxy proceeding on behalf of Mr. Prashant Mamgain, filed maliciously with the sole intention to harass the accused. The vengeful intent of the complainant is also visible in his conduct through the trial wherein he has made repeated efforts to delay the proceedings by either seeking frivolous adjournments or moving non- meritorious applications on one pretext or another. Ld. counsel for accused therefore submitted that the accused has successfully established a probable defence by creating a credible doubt in the case of the complainant and she may therefore be acquitted of the offence under section 138 NI Act.

9. While Ld. counsel for the accused presented exhaustive arguments, counsel for the complainant failed to argue his case despite opportunity. Further no written submissions were filed. However,

while submitting upon his application for recording of additional statement under section 313 CrPC, ld. counsel for the complainant submitted before this court that his entire case stands proved by the order Ex C1 and there remains nothing more to argue in support of his case. The only defence taken by the accused that she had no transaction with the present complainant, is proved to be false in view of Ex. C1 and accordingly the accused has failed to establish any probable defence rendering herself liable for conviction under section 138 of NI Act.

Appreciation of evidence

10. I have considered the rival submissions and perused the record. I shall deal with each of the defence put forth by the accused in light of the evidence placed on record by the parties.

a. Defence of Non-receipt of legal demand notice

11. The accused has denied receipt of any legal demand notice and therefore sought that the complaint be held non-maintainable being violative of Section 138(b) of NI Act. In D. Vinod Shivappa v. Nanda Belliappa (2006) 6 SCC 456 Honorable Supreme Court while discussing service of legal demand notice had laid that the objective of section 138(b) Ni Act is solely to avoid in-justice and hardship to an honest drawer especially where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.

12. In the instant case, perusal of record shows that legal demand notice dated 05.01.2010 (Ex CW1/3) was sent to the accused addressed at "Bungalow No. 37C, Royal Hills, CGHS, New Dindoshi Mahada Colony, Goregaon (east), Mumbai - 400063" by way of Speed post, UPC and courier (Receipts annexed as Ex CW1/4 to Ex CW1/6). The Consignment Tracker Report (Ex CW1/7) indicates the same to have been delivered. Now the accused has not denied association with the above mentioned address. In fact she has herself, in her plea of defence, recorded on 24.05.2013, submitted before the court that she used to reside at the address wherein the legal demand notice was sent by the complainant but she later shifted from that address. Therefore, where the accused has not denied her association with the address so mentioned by the complainant on the legal demand notice, it cannot be said that the complainant sent the legal demand notice to some random address simply to harass the accused especially when the tracking report Ex CW1/7 indicates due delivery. Accordingly, in the present case, service of legal demand notice to the last known address of the accused in knowledge of the complainant seems sufficient compliance of the provision laid by law.

13. Even otherwise, three judge bench of Honorable Supreme Court in case titled C.C Alavi Haji Vs Palapetty Muhammed & Anr (2007) 6 SCC 555, has categorically stated that non-receipt of legal demand notice cannot be the only defence. If at all the accused did not receive the legal notice he

can make the payment so due within 15 days of receipt of summons from court along with copy of the complaint. A person who does not pay even after the receipt of court summons cannot contend that there was no proper service of notice as required under Section 138 NI Act, by ignoring the statutory presumption under Section 27 of General Clauses Act.

14. In the present case as well, after her appearance on 06.11.2012, the accused had ample opportunity to make good her honest failure, if any to make arrangement for honoring the impugned cheque which is the sole purpose of sending the legal demand notice. Therefore, at this stage, the liability of the accused cannot be absolved merely on the technical ground of non-receipt of legal demand notice. Accordingly, the defence of non-receipt of legal demand notice stands dismissed.

b. Defence of Security Cheque

15. Ld. counsel for accused has submitted that the impugned cheque was handed over as a blank but signed cheque to one Mr. Prashant Mamgain as security against a friendly loan detailed in MOU dated 22.07.2002 (Ex DW1/1 OSR) which she has duly repaid. However, the said Mr. Prashant instead of returning the security cheque upon conclusion of the contract, misused it and filed the present frivolous litigation through his friend and business partner Gulshan Arora who is the complainant in the present case.

16. The scope of security cheques under Section 138 NI Act was discussed extensively by the Honorable High Court of Delhi in *Credential Leasing & Credits Ltd. vs Shruti Investments & Anr.* CRL. L.P. 558/2014. Relevant para is enumerated as follows:

"28. In my view, therefore, the scope of Section 138 NI Act would cover cases where the ascertained and crystallised debt or other liability exists on the date that the cheque is presented, and not only to case where the debt or other liability exists on the date on which it was delivered to the seller as a post-dated cheque, or as a current cheque with credit period. The liability, though, should be in relation to the transaction in respect whereof the cheque is given, and cannot relate to some other independent liability. If, on the date that the cheque is presented, the ascertained and crystallised debt or other liability relatable to the dishonoured cheque exists, the dishonor of the cheque would invite action under Section 138 NI Act. There could be situations where, for example, an issue may be raised with regard to the quality, quantity, deficiency, specifications, etc. of the goods/services supplied, or accounting. It would have to be examined on a case to case basis, whether an ascertained or crystallised debt or other liability exists, which could be enforced by resort to Section 138 NI Act, or not."

17. Therefore, in the instant case as well, where the accused has admittedly signed the cheque in question and allegedly handed it over to Mr. Prashant Mamgain, she cannot escape her liability by mere averment that the subject cheque was only a security cheque and was not issued for discharge of any legal liability, if it is established that an ascertained and crystallized debt or other liability

existed on the date when the cheque was presented towards the drawee of the cheque.

18. Further even if the cheque was issued by the accused in favour of Mr Prashant and it was the said Mr. Prashant who endorsed the same further to the present complainant, even if without permission or authority of the accused i.e. the drawer of the cheque, the same will not invalidate her liability towards the fate of the cheque, since a cheque being a negotiable instrument can be negotiated further against due legal liability to some third person (whom the original drawer may not know), simply by indorsement or delivery as provided under section 47 and 48 of the Negotiable Instrument act. What needs determination therefore, is whether any legally recoverable liability existed on the date of presentation of the cheque on part of the accused towards the drawee of the cheque or towards the holder in due course who further endorsed the same.

19. Further even if undated cheques were handed over to the complainant company by the accused and it was the complainant company who affixed the date, name of payee and amount thereon the same will not be a material alteration as to render the impugned cheque void as laid by the Honorable Delhi High Court in judgement in case titled Ravi Chopra vs State 2008(2) JCC (NI) 169.

20. Further, there is no law that a person drawing the cheque has to necessarily fill it up in his own handwriting. When a blank cheque is signed and handed over, it means that the person signing it has given implied authority to the holder of the cheque, to fill up the blank which he has left. A person issuing a blank or undated cheque is supposed to understand the consequences of doing so. He cannot escape his liability only on the ground that blank or undated cheque had been issued by him. Reliance is placed upon the decision of Honorable Delhi High Court in judgement in case titled The Jammu and Kashmir Bank vs. Abhishek Mittal, Crl. A. No. 294/2011 (Decided on 26.05.2011). However, the accused cannot fill and present the cheque for an amount more than what is due to him on the date of presentation. Accordingly, this court shall now go on to determine the liability of the accused on the date of presentation of the impugned cheque.

c. Defence of non-existence of any legal liability

21. The primary defence taken by the accused as submitted in her plea of defence to the notice framed under section 251 CrPC and again in his statement of defence under section 313 Cr.PC read with Section 281(1) CrPC is that she has no liability towards the complainant. She has submitted through witness DW1 that the impugned cheque was handed over to one Mr. Prashant Mamgain against a friendly loan/business partnership detailed in MOU (EX DW1/1) executed on her behalf by DW1, whereby the said Mr. Prasahant invested in many of her commercial projects including a series titled 'Kho Gayeen Manzilen' wherein he has been credited as Financial advisor (Ex DW1/3). It is her defence that she has already repaid the loaned amount along with interest etc, as per the instructions of Mr Prashant and therefore the impugned cheque which was given as security for the transaction was devoid of any legal liability on the date of its presentation.

22. Now while the accused contested the claim of the complainant in her plea of defence and her statements under section 313 CrPC, she did not step into the witness box to depose the same on oath and prove the veracity of her contentions by subjecting her testimony to the test of cross-

examination. Honorable Delhi High Court in V S Yadav vs Reena 2014 SCC Online Del 107 while discussing the evidentiary value of statement of accused recorded under section 313 CrPC and plea of defence under section 251 CrPC has laid as follows:

"5. 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."

23. Therefore, in the instant case as well, the plea of defence of accused to the notice framed under section 251 CrPC and her further statement explaining incriminating circumstances against her recorded under section 313 CrPC read with Section 281(1) CrPC, both not being on oath and not being subjected to the scrutiny of cross examination cannot be considered to be a substantial or even a corroborative piece of evidence and therefore cannot by itself exude the liability of the accused.

24. Further, in regards to the testimony of DW-1 and the documents Ex DW1/1 to DW1/7 even if the same is assumed to be true and accurate as is, they go only as far as to prove that the accused had some transaction with one Mr Prashant Mamgain. However, there is nothing to establish that the impugned cheque (Ex CW1/1) was indeed issued regarding this transaction between the accused and Mr Prashant Mamgain.

25. Relevant portion of the said MOU Ex DW1/1(OSR) is extracted as follows:

"IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. The borrower confirms that the amount Rs. 12,00,000/-, [Rupees Twelve Lakhs only), will be borrowed for producing various serials under the banner of Mangalam Arts & Creations and would be marketed for different satellite television channels. The first instalment of Rs. 8,00,000/- (Rupees Eight Lakhs only) will be received on the day of signing this MoU and balance Rs. 4,00,000/-

[Rupees Four Lakhs only) will be received within one month of signing this MOU.

2. The Borrower confirms that the money is borrowed for a period of One and a Half years starting from the date of signing this MOU. The principal money advanced by the Financier to the borrower would be repaid exactly after the completion of One and a Half years from the date of execution of this MOU.

3. The money borrowed bears an interest rate of 36% per annum and would be payable on monthly basis i.e. 3% per month.

4. The borrower has the option of extending the loan period by another Six months giving a prior notice of at least One-month. The borrower has also the option of prepayment of the loan before one and half years only after giving prior notice of One month. The rate of interest would be applied as mentioned in clause 3 of this MOU

5. The borrower also confirms to issue one post-dated cheque for an amount equal to the amount advanced by the Financier (same as mentioned in clause of this MOU) in favour of the financier with a covering letter stating that the financier will be entitled to deposit the same on due date, if borrower does not ask for an extension. In case of extension, the borrower would issue the separate cheque and the previous cheque would be returned to the borrower."

26. Clearly, the above MOU Ex DW-1/1 (OSR) bears no mention of the impugned cheque (Ex CW1/1) bearing no. 920066 dated 26.12.2009 drawn on ICICI Bank, Goregaon Branch, Mumbai for Rs. 15,00,000/ in favour of the com- plainant. Further the terms of the MOU read as is, imply that at the time of execution of the said MOU, a post dated cheque in distinction from a blank signed cheque was handed over to the financier, Mr. Prashant Mamagain by the borrower (present accused) for a sum of Rs. 12,00,000/- which is the amount borrowed under the MOU, dated around 22.01.2003 i.e. the agreed upper limit for repayment (one and a half year from date of execution of MOU). However, to the contrary the impugned cheque bears the name of payee as Gulshan Arora, is for a sum of Rs. 15,00,000/- and is dated 26.12.2009 and thus is in absolute contravention of the terms so mentioned in the MOU relied upon by the accused.

27. Further, while the MOU provide for extension of the loan period through prior notice and replacement of cheque, the accused or DW-1 have neither made any such submission as to extension of the original MOU nor have placed any document on record, like a notice of extension or fresh MOU etc, to establish that the term of loan under the MOU was ever extended and the original cheque given as security simultaneous to the MOU was later replaced with the impugned cheque (Ex CW1/1) in accordance some new agreement. Therefore, there is nothing on record to prove or even probablize that the impugned cheque was handed over by the accused to Mr. Parshant Mamgain as part of the MOU Ex DW1/1(OSR).

28. Again the brochure Ex DW1/3(OSR), counter of deposit slips Ex DW1/4 (OSR) and the transaction summary sheet Ex DW1/5 even if assumed to be true and accurate per se, only indicate that some business transactions occurred between the accused and the said Mr. Parshant Mamgain. However, the same does not exclude the possibility of some other transaction between the accused and the present complainant Mr. Gulshan Arora. Accordingly, the submissions of the accused in this regard seem non-conclusive.

29. Further no evidence has been lead by the accused to suggest that she ever demanded the return of her cheque from the said Sh. Prashant Mamgain. No submissions have been made as to why didn't the accused take any active steps to safeguard her interest after the said Sh. Prashant alleged

refused or delayed such return of her cheque despite alleged payment of all dues. Neither the accused issued any Stop Payment Instructions to her baker qua the impugned cheque nor did she initiate any civil or criminal proceedings against the said Sh. Prashant or the present complainant regarding the alleged misuse, though she has been vehemently contesting the present case since 2013. This is so when she has made a serious allegation in additional statement recorded under section 313 CrPC read with section 281 CrPC that the said Mr. Prashant Mamgain intimidated & coerced her into entering into a settlement with the present complainant before a court of law upon a false promise of withdrawing all cases against her and her mother filed by him in various trial courts across the country. Therefore, the conduct of the accused does not represent what can be expected of a reasonable, prudent person making the version elucidated by her improbable.

30. Now while the accused has consistently denied having any association with the present complainant Mr. Gulshan Arora and has clearly refused having entered into any settlement etc. with him, the complainant has placed on record Ex C1 which is a certified copy of an order dated 22.08.2009 in the court of Ld.MM, Rohini Courts in CC NO. 2152/1/08 titled Gulshan Arora Vs Alka Kaushal whereby the court has recorded a settlement between the present parties. The said order succinctly records in presence of the present accused Ms Alka Kaushal that the matter has been settled between the parties and a cheque bearing no 920066 dated 26/12/2009 in sum of Rs 15,00,000/- drawn upon ICICI Bank, Goregaon Branch, Shagun Mall, Filmcity Road, Goregaon(E) was received by the complainant from the accused as full and final settlement of the above case. Statement of both the parties have been recorded in this regard and both have agreed to abide by the compromise deed dated 11.08.2009 executed between them whereby the accused Alka Kaushal while undisputedly admitting her liability has issued the above cheque to the complainant Gulshan Arora as settlement amount. Pertinently this is the same cheque which is the subject matter of the present complaint.

31. Clearly, the accused has presented before this court a false defence that she had no association with the present complainant and that she has never entered into any compromise or settlement with the complainant. It is pertinent to note here that the accused through the trial never made any submission about any previous litigation or some coerced/fraudulent settlement agreement between the parties. It is only after the complainant placed on record order Ex C1 that the accused in her additional statement recorded under section 313 CrPC read with section 281 CrPC on 01.10.2020 acknowledged the existence of such settlement and submitted that she was coerced to execute the same by Mr. Prashant Mamgain. The contentions of the accused at such belated stage therefore seems like a careful afterthought to improvise her defence in light of the new evidence on record. Accordingly, in view of the order Ex CW1/1, the defence as submitted by the accused stands invalidated.

32. The final contention as advanced by ld counsel for accused is that a cheque given in pursuant of a settlement/compromise upon dishonor does not give rise to a new cause of action and therefore a second complaint under section 138 NI act is non-maintainable. She has placed reliance on the judgement of judgement of Honorable Supreme Court in case titled Lalit Kumar Sharma and Anr. Vs. St. of UP and Anr (2008) 5 SCC 638 and Judgment of Honorable High Court of Delhi in case titled Thakur Arora vs State and Anr. (2009) SCC Online Del 403 in this regard.

33. I have meticulously studied the judgements cited and in my considered opinion both the judgements are distinguishable on facts from the instant case. In Lalit Kumar Sharma and Anr. Vs. St. of UP and Anr (Supra), the original complaint wherein the compromise was reached between the parties was pending when the second complaint was filed by the complainant against the accused upon dishonor of the cheque received in settlement of the first complaint. Accordingly, the compromise for which the cheque was issued was not fructified as the complainant never withdrew/compounded the complaint upon receipt of the settlement cheque. Further, in Lalit Kumar Sharma (Supra), the accused persons were eventually convicted by the trial court in the original complaint and they underwent rigorous imprisonment of 1 year and paid fine of Rs. 20,000/- each. The court was therefore of the view that the accused persons have been adequately punished. Thus the question of entertaining a second complaint did not arise.

34. Again, in Thakur Arora vs State and Anr. (supra), Honorable High court of Delhi while discussing the dicta laid in Lalit Kumar Sharma and Anr. Vs. St. of UP and Anr (Supra), observed that the parties in their compromise deed, recorded in form of a MOU, in clause 5 had agreed that in case any cheque issued in pursuant of settlement is dishonored, the MOU shall come to an end and the matter shall continue as there has not been any compromise/understanding. However, the Ld. Trial court despite being aware that some of the cheques issued in terms of the settlement agreement got dishonored, disposed of the original complaint after placing reliance on the judgement of Supreme Court in Venkatesh Dutt vs. M/S Shoes East Limited 2004 (1) JCC (NI) 44. It is in revision against this order that the court applied the dicta laid in Lalit Sharma (supra) and ordered for revival of the original complaint.

35. It is noteworthy, that even in this matter, none of the parties to the original complaint had fulfilled their obligation under the Compromise /settlement deed i.e. neither the accused paid the agreed amount nor the complainant withdrew the said complaint. The complaint was disposed of by the order of the trial court and not upon the request of the complainant pursuant to the settlement. In fact the complainant had objected to such disposal on the ground that some of the cheques given in settlement had already bounced. The High Court of Delhi therefore allowed revival of the complaint by setting aside the order of the trial court to avoid multiplicity of proceedings and to ensure that the complainant is not left remedy less.

36. However, in the instant case, parties in the original complaint bearing CC no. 2152/1/08 entered into a settlement in terms of a compromise deed dated 11.08.2009 whereby the accused handed over the impugned cheque bearing no. 920066 for Rs 15,00,000/- after acknowledging her due liability, to settle the matter. The complainant thereafter moved an application dated 19.08.2009 for withdrawal/compounding of complaint and the same was compounded after recording statements of both parties by order dated 20.08.2009.

37. In the case at hand therefore, the parties entered into a fresh agreement i.e. the compromise deed dated 11.08.2009 whereby the complainant promised to withdraw the criminal prosecution upon the promise of the accused to pay a consideration of Rs 15,00,000/- by way of a post dated cheque. The said agreement had all essentials of a contract under the Indian Contract Act and therefore is legally enforceable.

38. Now where the promisor i.e. the complainant in pursuant of the contract has fulfilled his promise of withdrawal of the complaint, the promisee i.e. the accused cannot be allowed to escape fulfillment of her obligation arising out of such contract i.e. to make good the payment as agreed upon in the contract. The same is a legally enforceable liability. For obvious reasons therefore, the liability of the accused in the present case is not to repay the debt alleged by the complainant in the former complaint bearing CC no. 2152/1/08 before LD MM, Rohini Courts but for the liability to pay the consideration amount as agreed under the contract i.e. compromise deed date 11.08.2009 for withdrawal of the criminal complaint against her. Such liability would have also been valid and enforceable even if in contradiction with the present case where the accused has unconditionally accepted her liability in the compromise deed dated 11.08.2009, the accused would have entered into a settlement agreement without acknowledgement of her liability, merely to buy peace of mind.

39. In such circumstances therefore, the financial capability of the complainant to advance the original friendly loan is of no consequence. Even otherwise where the accused has failed to rebut the presumption under section 139 read with section 118 NI Act, the claim of the complainant cannot be denied only because he did not mention the details of the transaction i.e. the amount of loan, time and date when the original friendly loan was extended or his source of funds or that the complainant is not supported by any written loan agreement. Again non- disclosure of a friendly loan in ITR statements, may invite penalty under the provisions of Income Tax Act, the same will have no bearing upon the claim of the complainant under section 138 NI Act. Accordingly, contentions of Ld. counsel of accused in this regard stands dismissed being non-meritorious.

40. In view of the above discussion, therefore, accused Alka Kaushal, W/o Sh.

Ravee Kaushal stands convicted of the offence punishable under section 138 of Negotiable Instruments Act. Digitally signed by AMARDEEP KAUR AMARDEEP Date:

KAUR 2020.10.0
15:28:30
+0530

Announced in Open Court

(AMARDEEP KAUR)

on 06.10.2020

MM(NI) - 03/NDD/PHC