Devanand Mishra vs . Smt. Ambarawati on 29 August, 2016

IN THE COURT OF SH. HARJEET SINGH JASPAL
METROPOLITAN MAGISTRATE, DWARKA COURTS, NEW DELHI

Old CC No. : 438/15
New CC No.: 4991707/2016
Devanand Mishra Vs. Smt. Ambarawati
U/s : 138 Negotiable Instruments Act

J U D G M E N T

1 Date of the commission of offence	:	31/12/2014 approx.
2 Name & address of the Complainant	:	Shri Devanand Mishra S/o Late Sh. Daya Shanker M c/o Smt. Geeta Devi R/o H. No.21, Gali No.2, East Krishna Vihar Najafgarh, New Delhi-43.
3 Name of the accused and address	:	Smt. Ambarawati W/o Sh. Brahmanand R/o 73/9, Kishangarh Villag New Delhi-110 070.
4 Offence complained of	:	U/S 138 Negotiable Instrume
5 Plea of accused	:	Pleaded not guilty
6 Final order	:	Convicted
7 Date of such order	:	29/08/2016

Date of Institution of case : 12.01
Date of decision of the case : 29.08.

Old CC No. : 438/15, New CC No.: 4991707/2016

JUDGMENT

1. Vide this judgment I shall dispose off the aforementioned complaint case between Sh. Devanand Mishra S/o Late Sh. Dayashankar Mishra, aged about 38 years (hereinafter referred to as the complainant) and Smt. Ambrawati, W/o Sh. Brahamand, aged about 35 years (hereinafter referred to as the accused).

2. Brief facts, as per the complaint, are that the accused and complainant had friendly terms. The accused approached the complainant through a common friend, Sh. Yogender Singh Rathore and sought a financial help in sum of Rs.5 lakhs. The said money was required by the accused for purchase/repair of commercial vehicles. At the instance of Sh. Yogender Singh Rathore, the complainant disbursed a loan of Rs.5 lakhs in favour of the accused. As per the complainant, pursuant to the loan given by the complainant, a loan agreement was executed between the complainant and the accused on a non-judicial stamp paper of Rs.50/- and it was agreed that the loan amount shall be returned within 02 years of it being disbursed by the complainant and pursuant thereof, the accused issued a cheque bearing no.484005 dated 03/12/2014 in the sum of Rs. 5 lakhs drawn on Andhra Bank (herein after referred to as the cheque in question) in favour of the complainant. It is averred that upon presentation, at the bank of the complainant, the cheque in question got dishonored for the reasons, Payment stopped by the drawer. Thus, obligating the complainant to knock the doors of the present court and seek proper remedy as per the law in force.

3. Upon the present complaint being filed and after taking cognizance of the offence under Section 138 NI Act, the court summoned the accused and thereafter, notice was framed under Section 251 Cr.P.C vide order dt.11/12/2015, to which the accused pleaded not guilty and claimed trial. The complainant was subjected to cross-examination by the accused, after the application of the accused U/S 145(2) N. I. Act was allowed in Old CC No. : 438/15, New CC No.: 4991707/2016 2/14 favour of the accused. After Elaborate and sufficient opportunity was granted to both parties to lead evidence and after the complainant's evidence, the accused was examined as per legislative mandate of Section 313 Cr.P.C. All the incriminating evidences and the corresponding documents were put to the accused and she was given a sufficient opportunity to explain herself, in the presence of her counsel, the substance thereof was recorded in Question Answer form. Accused chose not to lead DE.

4. The documents relied upon by the complainant are as follows :

i. Ex.CW-1/A(OSR) is the copy of agreement dt.02.04.2013. ii. Ex.CW-1/B is the cheque in question.

iii. Ex.CW-1/C is the cheque returning memo. iv. Ex.CW-1/D is the copy of legal notice.

v. Ex.CW-1/E is the postal receipt.

vi. Ex.CW-1/F is the tracking report.

vii.Evidence on affidavit is Ex.CW-1/1.

5. As per the prevalent law and the practice, the complainant deposed on an affidavit and same was taken on record as CW-1/1. In his examination-in-chief i.e. his

testimony on an affidavit, the complainant deposed that he gave a friendly loan of Rs.5 lakhs to the accused, for a period of 2 years, for which the accused issued the cheque in question. Upon the cheque being dishonored at the bank of the complainant, the complainant contacted the accused who gave false assurances, the said assurances were never honored, thus constraining the complainant to approach the present court.

6. With the permission of the Court, the complainant was cross-examined. In his cross-examination before the Court the complainant stated that a loan agreement was prepared pursuant to the loan given to the accused. The said loan agreement is Ex.CW-1/A (OSR).

Old CC No. : 438/15, New CC No.: 4991707/2016 3/14 In the cross-examination of the complainant by Ld. Counsel for the accused, the Ld. Counsel suggested to the complainant that the complainant is a professional money lender, the same was denied. The witness, CW-1, deposed that the document, Ex.CW-1/A (OSR) was prepared by the accused herself, however, the said witness could not say with certainty if the handwriting on the said document was that of the accused. The complainant admitted that the cheque in question was given to him as a security.

(ii) CW-2 Sh. Yogender Singh Rathore: He deposed that the accused is known to him through her husband. As per the said witness, the accused borrowed a sum of Rs.5 lakhs from the complainant and out of the said sum, Rs.2.5 lakhs was returned to the said witness, as the accused owed money to him and Rs.2.5 lakhs was taken by the accused. The money was given in the presence of CW-2. As per the complainant, some money was returned by the accused, however, the entire money has not been returned.

In his cross-examination, at the hands of Ld. Counsel for the accused, the CW-2 stated that he gave loan to the husband of the accused as he wanted to purchase commercial vehicles. He further stated that on a separate occasion, the accused borrowed a sum of Rs.1 lakh from him. The Ld. Counsel for the accused drew attention of the said witness to the cheque in a sum of Rs.1 lakh, bearing no.484004, Andhra Bank (Document Ex.DW1/ZA1); the CW-2 admitted that the said cheque, i.e. document Ex.DW1/ZA1, might be the cheque given to him by the accused and the same must have been returned to husband of the accused/ the accused upon repayment of Rs.1 lakh by the accused.

7. The accused chose not to lead defence evidence. In her examination before the Court U/S 313 Cr. P.C., she stated that she did not issue any cheque to the complainant, rather the cheque in question was given to CW-2, Sh. Yogender Singh Rathore, who must have further handed over the same to the complainant in the present matter. The accused disputed the validity of the agreement, Ex.CW-1/A (OSR) and stated that no agreement was ever prepared between her and the complainant. She further stated that she is illiterate and that she has only signed a blank paper. She denied a liability of Rs.5 lakhs towards the Old CC No. : 438/15, New CC No.: 4991707/2016 4/14 complainant, however, she admitted her liability of Rs.1.5 towards the complainant. She has denied receiving the legal notice.

8. The accused admitted her signatures on the cheque in question, in her statement under section 313 Cr.PC.

9. Coming on to the final arguments, it is argued on behalf of the complainant that the accused owes a sum of Rs.5 lakhs towards the complainant and is deliberately avoiding the payment. It is further argued that the amount in question was handed over to the accused based on an assurance that she shall return the money within two years, however, despite multiple reminders, the accused has failed to return the amount in question. Lastly, the complainant argued that the defence has miserably failed to dislodge and disprove the presumption lying in favour of the complainant as per Section 139 r/w 118 of N. I. Act as the accused has not lead any defence evidence. Lastly, it is contended that the complainant has successfully proved the case against the accused, thus, laying the ground for the conviction of the accused.

10. In the final arguments from the defence side, the Ld. Counsel for the accused has argued that the accused owes no liability towards the complainant and no amount has ever been taken by the accused from the complainant. It is further argued that no case U/S 138 of N. I. Act is made out against the accused considering the fact that the legal notice was never served to the accused. It is argued that the accused gave blank signed cheque to CW□2, Sh. Yogender Singh Rathore for the purpose of securing her loan taken from CW□2 and that the CW□2 has fraudulently passed over the cheque in question to the complainant and has thus filed a present complaint to extort money from her. The cheque in question is stated to be a security cheque. Finally, Ld. Counsel for the accused submitted that the present is a fit case for the acquittal of the accused.

11. I have heard the final arguments of both the sides and have also perused the record carefully.

Old CC No. : 438/15, New CC No.: 4991707/2016 5/14

12. Before proceeding to the further adjudicatory discussion on merits, I deem it appropriate to take on record the introductory discussion on theory, the relevant laws and the nuances thereof.

13. An offence under section 138 of N.I. Act is deemed to have been committed when 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 honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank. To launch prosecution under the said section all the statutory requirements must be fulfilled. Section 138 NI Act is reproduced hereinunder:

"138. Dishonour of cheque for insufficiency, etc. of 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 extended to two years), or with fine which may extend to twice the amount of the cheque, or with both."

14. At this stage, in order to take my adjudicatory disposition further, I deem it appropriate to take on record the legislative mandate in form of section 118 NI Act and section 139 NI Act, the same are reproduced hereinunder:

"Section 118 Presumptions as to negotiable instruments. --Until the contrary is proved, the following presumptions shall be made:--

Old CC No. : 438/15, New CC No.: 4991707/2016 6/14

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

(b)xxxx Section 139 Presumption in favour of holder: It shall be presumed, unless contrary disproved that the holder of the cheque received the cheque for the discharge, in whole or in part of any debt or other liability."

15. Section 118 of the NI Act inter alia provides that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the NI Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability. The said presumptions are rebuttable in nature.

16. In Kumar Exports Vs. Sharma Carpets, (2009) 2 SCC 513, the Hon'ble Supreme Court, in this regard held as under:

"The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular

circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither Old CC No. : 438/15, New CC No.: 4991707/2016 7/14 possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. 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 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."

17. A closer look at the phraseology used U/S 139 of N. I. Act reveals that though the legislature has provided a protection to the drawee of the cheque or the holder in due course of the cheque, as the case may be, in form of presumption U/S 139 of N. I. Act, the said presumption is rebuttable in nature and the same can be done by leading cogent evidence on the behalf of the defence.

18. At this juncture, I deem it appropriate to take on record the observation made by Hon'ble Delhi High Court in case titled as V.S. Yadav VS. Reena 172 (2010) DLT 561, commented upon the obligation of the accused while setting up a defence to:

> "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 Old CC No. : 438/15, New CC No.: 4991707/2016 8/14 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 said case, the Hon'ble High Court further observed:

> "7. ..... Mere pleading not guilty and stating that the cheques were issued as security, would not given amount to rebutting the presumption raised under Section 139 of N. I. Act. If mere statement under Section 313 Cr. P.C. or under Section 281 Cr. P.C. of accused of pleading not guilty was sufficient to rebut the entire evidence produced by the complainant/prosecution, then every accused has to be acquitted. But, it is not the law. In order to rebut the presumption under Section 139 of N. I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheques were issued. It was for the accused to prove if no loan was taken why he did not write a letter to the complainant for return of the cheque. Unless the accused had proved that he acted like a normal businessman/prudent person entering into a contract he could not have rebutted the presumption under Section 139 N. I. Act. If no loan was given, but cheques were retained, he immediately would have protested and asked the cheques to be returned and if still cheques were not returned, he would have served a notice as complainant. Nothing was proved in this case".

19. Coming to the present case, the accused in her statement before the Court stated that the cheque in question was never handed over to the complainant and was rather given to CW-2 for the purpose of securing a friendly loan from CW-2. The said loan has not been paid, as per the accused. In order to rebut the presumption under Section 139 of N. I. Act r/w Section 118 N. I. Act, the accused, by cogent evidence, was obligated to prove the circumstance under which the cheque in question was issued. The burden of proof has shifted to the accused since she has admitted her signatures on the cheque in question and Old CC No. : 438/15, New CC No.: 4991707/2016 9/14 thus it was for the accused to prove that if she has already repaid the entire amount to CW-2, why did she not claim the cheque back, why did she not write a letter to the CW-2 for return of the cheque(s) or why did she not issue a notice to the CW-2 for return of the

purported retention of the cheque so as to cause a consequent delivery of the cheque to the accused. Unless the accused had proved that she acted like a prudent person, protecting her interests she could not have rebutted the presumption under Section 139 N. I. Act.

20. Further, it is also pertinent to highlight here the averments/admissions given by the accused in her statement U/S 313 Cr.P.C. In the course of her examination she admitted her liability of Rs.1.5 lakhs. To whom does she admit to owe this liability is not clear from her statement alone. Though, upon overall scrutiny of the case, it can be deduced that, within the realms of the present facts, she could owe this liability either to the complainant or CW-2, Sh. Yogender Singh Rathore. CW-2 has categorically stated before the Court that he has already received the entire sum from the accused and nothing remains pending. Therefore, it is only safe to deduce that the accused owes the liability of Rs.1.5 lakhs to the complainant. That being the case, the earlier statement of the accused that she does not know the complainant or that she owes no liability towards the complainant appears to be paradoxical and consequently doubtful too.

21. Undoubtedly the cheque in question and the cheque produced by Ld. Counsel for the accused during the cross-examination of the CW-2 are of consecutive serial numbers, however, this by itself does not absolve the burden upon the accused of dislodging the presumption of Section 139 r/w 118 N. I. Act as nothing was proved by the defence side, thus this court is compelled to doubt the defence put forth by the accused, specially since it is uncorroborated by any cogent evidence or any statement under the oath.

22. It cannot be forgotten that as per Section 118 N. I. Act, until contrary is proved, it shall be assumed that every negotiable instrument is transferred for consideration. Since the accused has already admitted her signatures on the cheque in question it was expected out of her that she shall, by deployment of cogent evidence, undo the burden of presumption Old CC No. : 438/15, New CC No.: 4991707/2016 10/14 U/S 118 N. I. Act r/w Section 139 N. I. Act. No such endevour has been made by the accused. In view thereof, thus this court is constrained to look at the defence of the accused with a suspicious eye.

23. Further, as has been noted above, there is no presumption under law that the explanation given by the accused shall be believed to be truthful, unless so proved. In the present case, the accused has stated that in her statement under section 313 Cr. P.C. and in her defence at the stage of framing of notice, that the cheque in question was not handed over to the complainant and was rather handed over to CW-2 for the purpose of securing a loan taken from the CW-2. If the accused wanted to prove this, she should have examined herself as a witness and would have faced the scrutiny of the cross-examination at the hands of the counsel for the complainant, however, neither she nor her husband appeared to dislodge the complainant's story. Nothing was proved in this case, thus this court is compelled to doubt the defence put forth by the accused, specially since it is uncorroborated by any cogent evidence or any statement under the oath.

24. At this juncture, another contention of Ld. Counsel for the accused about the non□ service of the legal notice is required to be dealt. It is contended on behalf of the accused that the mandatory requirement of Section 138 N. I. Act in form of the service of the legal notice has not been complied with and thus no case is warranted under the said section. Ld. Counsel for the complainant has argued per contra. It is averred that the legal notice was duly dispatched upon the correct address of the accused thereby the presumption in law qua the due service shall come into force.

25. The record reveals that legal notice dt. 16.12.2014 was put to post on 17.12.2014 as is shown by receipt, Ex.CW□1/E and the same was delivered on 18.12.2014, as is shown by tracking report, Ex.CW□1/F, upon the same address of the accused, which is disclosed by the accused in her statement U/S 313 Cr. P.C. Old CC No. : 438/15, New CC No.: 4991707/2016

26. At this stage, I deem it appropriate to refer to Section 27 of the General Clauses Act, 1897. The same is reproduced hereinunder:

> Meaning of service by post. Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression serve or either of the expressions give or sendor any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre□paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

27. The bare perusal of the said provisions makes it amply clear that upon due dispatch to a correct address the service is presumed to be affected. In C.C Alavi Haji vs Palepetty Mohd. & Anr (2007) 6 SCC 555 also it has been held by the Hon'ble Supreme Court that Section 27, General Clauses Act gives rise to a presumption that service of notice has been effected when it has been sent to the correct address by the registered post. In the case at hand the perusal of the record reveals that the legal notice was dispatched upon the correct address of the accused, the same has been exhibited by the postal receipts and the legal notice on record and hence as per the legislative mandate the court is bound to draw a presumption of its effective service. In these circumstances, presumption arose in favour (as per Section 27, General Clauses Act) of the complainant and the accused has failed to rebut the same as he did not lead any evidence to the contrary, nor there is any suggestion in the cross examination of the complainant which would suggest to the contrary. Thus, the court holds that the legal notice was duly served upon the accused.

28. Another issue which has been agitated by the Ld. Counsel for the accused is that the cheque in question is a security cheque and thus it cannot be assumed to be in discharge of any debt or liability. Ld. Counsel has drawn attention of the court to the cross□

examination of the CW□1, the complainant. The same is perused. The contextually relevant portion of the said cross□examination is reproduced hereinunder:□

"I required the execution of some documents before advancing the loan amount to the accused pursuant thereof, the accused produced document Ex.CW□1/A. It is correct that the cheque in question was given to me as security for the loan of Rs.5,00,000/□ which was advanced by me to the accused."

29. Unmistakenly, in the aforementioned statement the complainant has clearly admitted the cheque in question to be a security cheque. This admission by the complainant, as per the counsel for the accused, absolves the accused from any liability under section 138 NI Act.

30. An issue which remains pending for discussion is what is the legal sanctity of a 'security cheque' and what are the implications and nuances thereof.

31. Section 138 of the N. I. Act once again deserves to be looked at:

> "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 ....."

32. A careful scrutiny of the phraseology used U/S 138 N. I. Act i.e. "any cheque"

> deserves attention. The legislation does not uses any specific term or a demarcation so as to distinguish a security cheque or other cheques. The cheque whether issued for payment of debt or as security makes no distinction in law. The cheque is a negotiable instrument, it may be that some times the cheque is issued with a request on the part of the drawer to defer the presentation of the cheque for some time to enable the drawer to make payment by cash and take back the cheque or allow time to arrange funds for encashment of cheque. When
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> the amount is not paid as per oral understanding the payee is well justified to present the cheque for encashment. The cheque even if it is issued as a security for payment, it is negotiable instrument and encashable at the hands of payee. Therefore, merely because the drawer contends that it is issued as security is not a ground to exonerate the penal liability u/s 138 of the N. I. Act. Reliance is placed on the judgment of Suresh Chandra Goyal Vs. Amit Singhal (Delhi High Court delivered on 14.05.2015, Crl. L. Petition 706/14). Ergo the argument of Ld. Counsel for the accused qua the cheque being a security cheque, is ill

founded in law and hence is liable to be rejected.

33. To conclude, all the mandatory requirement as postulated under section 138 of the NI Act are found to be proved on behalf of the complainant. The accused has failed to dislodge the presumption U/S 139 of N. I. Act. In view of the entire discussion, hereinabove, the facts and the circumstances of the present case, this court is of the considered opinion that the case of the complainant has been proved beyond the shadows of reasonable doubt.

34. Accordingly, the accused, Smt. Ambrawati, W/o Sh. Brahamand is hereby convicted for the offence U/S 138 Negotiable Instruments Act.

35. Let the accused be heard on the point of sentence. Let the copy of the judgment be given to the accused free of cost.

Announced in the open court
today i.e. 29.08.2016

(Harjeet Singh
MM : DWARK

Old CC No. : 438/15, New CC No.: 4991707/2016