

Complainant vs Ms. Nakita Anand on 15 December, 2018

IN THE COURT OF MS. UPASANA SATIJA, MM-03 (NI ACT)
SOUTH-WEST DISTRICT: NEW DELHI

C.C. No.5006588-2016

CNR No.DLSW02-015869-2016

Under Section 138 of Negotiable Instruments Act, 1881

In the matter of :-

Smt. Rekha Dogra

W/o Sh. Ramam Dogra,

R/o A-15, Chandra Park,

Old Palam Road, Sector -15,

Dwarka, New Delhi.

.....Complainant

Versus

Ms. Nakita Anand

W/o Sh Kunjan Anand,

D/o Sh. Sachdev Malik,

R/o C-3/126, First Floor,

Janak Puri, New Delhi-110058.

Also at: A-1/264, Second Floor,

Janak Puri, New Delhi-110058.

And also at: Sterlite Power Grid Venture Ltd.,

F-1, Miva Corporate Suits, 1/2 Mathura Road,

ishwar Nagar, New Delhi-110065.

.....Accused

Offence complained of / proved	:	Under Section 138 Negotiable Instruments Act, 1881.
Plea of the accused	:	Pleaded not guilty
Date of Institution	:	05.12.2016
Final Order / Judgment	:	Acquitted
Date of pronouncement	:	15.12.2018

1 of 15

J U D G M E N T:-

1.

The present complaint has been filed under Section 138 of the Negotiable Instruments Act, 1881. The facts in brief as averred in the complaint are that in March 2016, the accused approached the complainant for a friendly loan of Rs.7,50,000/□ and promised to refund the same within four months. Accordingly, in second week of March 2016, the complainant advanced a friendly loan of Rs.7,50,000/□

in cash to the accused. In discharge of said liability, accused issued cheque bearing no. 407345 dated 25.07.2016 for a sum of Rs.7,40,000/□ drawn on ICICI Bank, Janak Puri, Delhi and paid balance amount of Rs.10,000/□ in cash. However, when the complainant presented the aforesaid cheque, it was dishonoured vide return memo dated 23.09.2016 for reasons 'Funds Insufficient'. The complainant allegedly then served legal notice dated 19.10.2016 on the accused demanding the cheque amount but in spite of service of said notice, the accused failed to make the payment of cheque amount and hence, committed an offence under Section 138, Negotiable Instruments Act.

2. In support of the allegations in his complaint, the complainant filed his evidence by way of an affidavit and placed on record the following documents:

(i) Cheque bearing no. 407345 dated 25.07.2016 for a sum of Rs.7,40,000/□ drawn on ICICI Bank, Janak Puri, Delhi (Ex.CW1/1). 2 of 15

(ii) Cheque return memo issued by Kotak Mahindra Bank where the aforesaid cheque was presented for encashment reflecting that the said cheque was returned unpaid for the reason "Funds Insufficient" on 23.09.2016 (Ex.CW1/2).

(iii) Legal Notice dated 19.10.2016 addressed to the accused on behalf of the complainant demanding the payment of cheque amount within fifteen days from the receipt of said notice (Ex.CW1/3).

(iv) Postal receipts reflecting the fact that the aforesaid legal notice was dispatched to the accused on 19.10.2016 (Ex.CW1/4, Ex.CW1/5, Ex.CW1/6, Ex.CW1/7 and Ex.CW1/8).

(v) Internet Generated Postal Track Report and acknowledgment card with respect to letter dispatched vide aforementioned postal and courier receipts (Ex.CW1/9 and Ex.CW1/10).

3. Upon consideration of the complaint and documents annexed therewith and upon examination of the complainant, the cognizance of offence under Section 138 Negotiable Instruments Act, 1881 was taken and process was issued against the accused. Accused appeared before this court and was admitted to bail. 3 of 15

4. Notice under Section 251 Cr.P.C. was framed against the accused to which, she pleaded not guilty and claimed trial. The accused denied having issued the cheque in question. She further denied knowing the complainant and stated not to have taken any loan from her. She denied the receipt of legal demand notice dated 19.10.2016.

5. Application under Section 145(2), Negotiable Instruments Act was filed by the accused seeking permission for recalling and cross examination of complainant

witnesses. The said application was allowed and the complainant was cross examined.

6. During her cross examination, complainant stated that she does not know whether she or her husband had Rs.12,00,000/- in cash in February 2016. She further stated that she does not remember the denominations of currency notes in which the loan was advanced. She further stated that she is doing the business of selling cloths and during the transactions, she came to know the accused. She further stated that she does not know whether her husband gave Rs.12,00,000/- to the accused in February 2016. She further stated that she keeps Rs.3.5 lacs in cash with her for business purpose but denied knowing the amount which her husband used to keep with him. She further stated that her monthly income is approximately Rs50,000/- of 15. She further stated that her business address is A-5, Chandra Park, Old Palam Road (from house). She further stated that she had Rs 3.5 lacs with her and remaining amount she took from my husband. She further stated that she had never asked about earning from the accused. She further stated that accused informed her that she has own house. She further stated that she had friendly relations with the accused and accused told her that she will return Rs.7.5 lacs in four months. She further stated that she had not shown the loan amount in her income tax return. She further stated that at the time of giving loan, no agreement was prepared or signed by the accused in this regard. She further stated that accused did not issue any receipt after taking Rs.7.5 lacs from her. She further stated that she does not know about the death of father in law of accused. She further stated that she does not know whether her husband know Namrita Vij. She further denied knowing whether her husband is contesting any case before this court or not. She further stated that she does not know who has filled the cheque in question and that the cheque was already filled. She further stated that she did not issue any receipt after receiving the cheque in question to the accused. She further stated that para no.2 of her complaint is correct. She further stated that she did not issue any receipt for Rs. 10,000/- which she had received from the accused. She denied that her husband had stolen the cheque in question from the house of accused. She further denied that accused had not given the cheque in question to her. She further denied that she filed a false and fabricated case in connivance with her husband against the accused. She further denied that she had not got the agreement as per Indian Stamp Act regarding the loan transaction with the accused. She further stated that she does not have any proof regarding the loan amount given to accused.

7. The complainant did not lead any further evidence.

8. The accused was examined in accordance with provisions of Section 313 Cr.P.C. wherein she denied having approached the complainant for any loan or to have taken any loan from her. She further stated not to have issued cheque Ex.CW1/1. She admitted her signature on the said cheque but denied filling the remaining particulars. She further stated that she had kept signed cheques at her house and the husband of the complainant used to visit her house. She further stated that the husband of complainant has also filed two cases u/s 138 NI Act against her and that the

complainant and her husband have alleged to advance approximately Rs.19,00,000/□ to her in the same month. She denied the receipt of demand notice and stated that at the relevant time, she was in Haridwar and not present at her house. She opted not to lead evidence in her defence.

9. Final Arguments were heard. During the final arguments, it was submitted by Ld. Counsel for the Complainant that all the ingredients of the offence 6 of 15 under Section 138 Negotiable Instruments Act are made out and accordingly the accused be convicted. He further submitted that the legal notice was duly served upon the accused on all the three available addresses as is evident from the track report. He further argued that no intimation was given by the accused to the bank to stop the payment of the cheque nor any complaint was made by the accused regarding the misuse of cheque even after receiving the summons

10. On the other hand, Ld. Counsel for accused argued that the complainant failed to establish the guilt of the accused beyond reasonable doubts and accordingly, accused be acquitted. He pointed towards the fact that complaint is drafted in a manner that the loan was advanced to the Chief Metropolitan Magistrate and not to the accused. He further submitted that advancing Rs.7,50,000/□in cash is in violation of Income Tax Rules and also the accused did not disclose the loan amount in her ITR which is in violation of Section 269SS of Income Tax Act. He further argued that income of the accused is not much as will warrant advancing the loan of such a huge amount. He further pointed towards the fact that no agreement was executed in respect of the loan advanced nor any receipt was issued by the accused. He further argued that there was no friendly relation of the complainant with the accused as the complainant was not even aware about the death of the father in law of the accused. He further argued that since the cheque is with the complainant, her husband might have stolen 7 of 15 the same. He further argued that since there was no loan agreement, as per the Stamp Act, there is no legally enforceable debt. The Ld. Counsel for accused relied upon certain judgments in support of his arguments.

11. In rebuttal, Ld. Counsel for complainant argued that during the cross□examination of the complainant, no suggestion was made regarding her financial capacity. He further submitted that accused admitted that complainant's husband is known to her. He further argued that no legal action was taken by the accused for misuse of the cheque. He further argued that no evidence was led by the accused and also no record regarding pendency of other cases was ever produced. Applicable Law and its application to present facts

12. To establish an offence under Section 138 of the Negotiable Instruments Act, the following ingredients are to be established by the complainant:

- (i) Cheque must have been drawn by the accused on an account maintained by him with a banker.

(ii) Cheque must have been drawn for payment of any amount of money to another person for discharge, in whole or in part, of any debt or other liability.

8 of 15

(iii) Said cheque is returned unpaid by bank for the reason that either 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.

(iv) The cheque must have been presented to the bank within a period of 6 months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(v) The payee or holder in due course makes a demand for payment by giving notice in writing to the drawer of the cheque within 30 days of receipt of information by him from the bank regarding the return of cheque as unpaid.

(vi) Drawer of the cheque fails to make the payment of the said amount to the payee or holder in due course of cheque within 15 days of said notice.

Section 142, Negotiable Instruments Act further requires the complaint under Section 138 must be made in writing by payee or holder in due course of cheque and such complaint must be made within one month from the date on which the cause of action arises i.e. within one month from the expiry of fifteen days time 9 of 15 within which the accused is required to make the payment of cheque amount upon receipt of demand notice.

13. Now coming to the facts of the present case, it is not in dispute that the accused signed the cheque in question.

At this stage, Section 20 of the Negotiable Instruments Act, 1881 become relevant which states that Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

Accordingly, if the signature on the cheque has been admitted, it is immaterial as to who has filled in the other particulars. The cheque which has been 10 of 15 signed by the account holder but remaining particulars of which, are filled by some other person is a valid cheque.

It is further not in dispute the cheque in question was returned unpaid for the reason "Funds Insufficient"; that the cheque was presented within the period of its validity; that upon information of dishonour of cheque, the complainant made a demand in writing for payment of cheque amount within a period of thirty days from the receipt of information of dishonour.

Accordingly, ingredients (i), (iii), (iv), and (v) of the offence under section 138 are well established and not in dispute.

14. However, the accused has averred that she did not owe any liability towards the complainant and that she did not receive the demand notice.

15. At this point, provisions of Section 118 read with Section 139 of the Negotiable Instruments Act become relevant which raises a presumption that the negotiable instrument was drawn for a consideration and that payee or holder in due course of cheque received that the said cheque for discharge, in whole or in part, of any debt or other liability 11 of 15 However, this is a rebuttable presumption. The burden of rebuttal lies on the accused. The standard of proof required is not as strict as is required to establish a criminal liability, and will be discharged on the basis of preponderance of probabilities.

16. Coming to the present case, averments have been made by the accused that she did not take any loan from the complainant nor issued cheque in question in her favour. She further stated that she had kept signed cheques at her home and the husband of the complainant used to visit her house. The burden of proving the said averments is on the accused. However, no evidence was led by the accused. As regards the argument of the Ld. Counsel for accused that the complaint is drafted in a manner that it appears that loan was advanced to the Chief Metropolitan Magistrate is concerned, the complaint is to be read as a whole and any sentence is not to be read in isolation. Upon considering the complaint as a whole, it is apparent that the complainant had alleged to have advanced the loan to the accused.

17. In view of the above, accused had failed to prove the defence taken by him. However, for rebuttal of presumption under Section 139 Negotiable Instruments Act, it is not essential for the accused to lead direct evidence but the same can be done on the basis of material already brought on record. Accordingly, it is to be seen 12 of 15 whether the accused has reasonably been able to rebut the presumption on the basis of

material on record.

17.1. The complainant has failed to sufficiently prove the source of the money advanced. Although a presumption is raised in her favour but since the amount advanced is huge, a duty was cast upon the complainant to prove the source of the same more so when specific questions were asked during her cross-examination. However, she did not file any documents to show that she or her husband was having the financial capacity to advance the loan as alleged. Further evasive replies were given by her during her cross-examination.

17.2. Further, no documents in respect of the loan advanced were produced and as testified by the complainant during his cross-examination, no such documents were ever executed. Also, no witness has been examined in whose presence the loan as alleged was advanced. No reasonably prudent person is expected to advance such a huge amount of money without executing any document or in absence of any witness.

17.3. The complainant stated to be having business of selling cloths and stated to know the accused as she was having transactions with her. However, she 13 of 15 failed to establish existence of such a relation with the accused which will warrant advancing such a huge amount without execution of any document.

17.4. Further, no reasonably prudent person is expected to advance such a huge amount without assessing the repaying capacity of the borrower. However, the complainant was not even aware of the income of the accused.

18. The standard of proof as required of the accused to rebut the presumption under S. 118 read with S. 139 Negotiable Instruments Act, 1881 is not beyond all reasonable doubts but the accused is required to raise a reasonable doubt through preponderance of probabilities. In view of the above discussion i.e. upon perusal of the material on record and taking into account the attending circumstances, I am of the view that accused has been able to sufficiently rebut the presumption raised against her by creating a reasonable doubt as to the advancement of loan by the complainant.

19. Since ingredient (ii) has not been satisfied, there is no need to discuss the remaining elements of the offence.

14 of 15

20. Upon consideration of the facts of the case and evidence adduced, this Court is of the view that the Complainant has not been able to establish the guilt of the accused beyond reasonable doubts and accused has been able to sufficiently rebut the presumption raised in favour of complainant under S.118 read with S. 139 of the Negotiable Instruments Act, 1881.

21. Accordingly, the accused is hereby acquitted of offence under Section 138 of the Negotiable Instruments Act, 1881.

UPASANA
SATIJA

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signed by
UPASANA
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Date:
2018.12.17
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Announced in the open Court
on 15th day of December, 2018

(UPASANA SATIJA)
MM-03 (NI Act)/South-West
Dwarka/ New Delhi

15 of 15