

# Uphar Finvest Ltd. ... Complainant vs Abdul Rahman ... Accused on 3 May, 2023

IN THE COURT OF  
METROPOLITAN MAGISTRATE (NI ACT) - 08  
SOUTH WEST DISTRICT, DWARKA COURTS, DELHI  
Presided by : Sh. Apoorv Bhardwaj

In case of:-

UPHAR FINVEST LTD.

... Complainant

VERSUS

ABDUL RAHMAN

... Accused

## JUDGMENT

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|--|---|
| a) Sl no. of the case :                                | 46916/2018  |
| b) CNR of the case :                                   | DLSW020480512018  |
| c) Date of institution                                 | 30.11.2018  |
| d) Name, parentage and address of the complainant :    | Uphar Finvest Ltd.<br>Registered office at 402-404, Fourth Floor, 73-74, Sheetla House, Nehru Place, New Delhi - 110019,<br>Through its Authorised Representative |
| e) Name, parentage and address of the accused persons: | Abdul Rahman<br>s/o Sh. Hazi Idrish<br>R/o H.No H-4, N-31, Jhuggi,<br>H-Block, Jahangir Puri, Near Sai Baba Mandir, New Delhi - 110033                            |
| f) Offence complained of :                             | 138 NI Act  |
| g) Total cheque amount :                               | Rs 1,00,000/-   |
| h) Plea of the accused :                               | Pleaded not guilty  |
| i) Arguments heard on :                                | 24.04.2023  |
| j) Final order :                                       | Convicted   |

k) Date of Judgment :

03.05.2023

## BRIEF STATEMENT OF FACTS FOR THE DECISION

1. Vide this judgment, I shall decide the present complaint filed under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'NI Act') by the complainant against the accused.

### Factual Matrix

2. As per the complaint filed by the Authorised Representative (hereafter, 'AR') of the complainant company, the accused availed a loan for purchasing an E-Rickshaw under the loan agreement no. ER-03064 dated 18.01.2017 for a sum of Rs 80,000/- (Rupees Eighty Thousand Only). The complainant released the payment through cheque in favour of 'City Savera Trading Company, A/14/90, Village Ramgarh, Jahangir Puri, New Delhi - 110033' i.e. the Authorised Dealer and accordingly the accused received the E-Rickshaw. As per the payment schedule the accused was liable to pay 16 monthly instalments of Rs 6500/- each. After payment of a few instalments the accused did not pay the remaining instalments and as per the statement of account of the accused an amount of Rs 1,35,146/- became due on him. Thereafter, the accused issued the cheque in question i.e. cheque bearing no. 660498 dated 06.10.2018 for a sum of Rs 1,00,000/- drawn on Corporation Bank. The complainant presented the aforementioned cheque to his bank i.e. City Union Bank Ltd, Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 2 of 12 Janakpuri Branch which was returned unpaid for the reason "Drawer's signature differs" vide returning memo dated 09.10.2018. Thereafter, despite issuance of legal demand notice to the accused, the accused failed to pay the cheque amount within 15 days thereof and hence the present case.

3. Upon a prima facie consideration of pre-summoning evidence, cognizance of offence under section 138 NI Act was taken and the accused was summoned. Thereafter, separate notice explaining the accusation was put to the accused under section 251 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') to which he pleaded not guilty and claimed trial. His statement under section 294 CrPC was also recorded at this stage and the following aspects were admitted/denied by him:-

3.1. Signatures on the cheque in question - Admitted. 3.2. Filling up of material particulars - Denied. 3.3. Receiving the legal demand notice - Denied.

(However, it was admitted that the address mentioned on the legal notice was his correct address.)

3.4. Genuineness of the postal receipt - Admitted 3.5. Genuineness of the returning memo - Admitted In his defence he stated that he had taken a loan of only Rs 80,000/- for e-rickshaw and has already repaid substantial amount i.e. Rs 45,000/- at one time and a few more instalments to the complainant. Thereafter, cross-examination of the complainant's witnesses under section 145(2) NI Act was permitted.

4. The AR of the complainant was examined as CW-1 and he relied on his pre-summoning evidence as his post summoning evidence Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 3 of 12 and relied on his evidence by way of affidavit Ex CW1/1 and on the following documents i.e. 4.1. Ex. CW1/A (Board Resolution in favour of the AR) 4.2. Ex. CW1/B (Power of Attorney) 4.3. Ex. CW1/C (Certificate of commencement of business) 4.4. Ex CW1/D (Certificate of Registration issued by RBI) 4.5. Ex CW1/E (cheque in question) 4.6. Ex CW1/F (Returning memo) 4.7. Ex CW1/G (Loan account statement) 4.8. Ex CW1/H (Certificate u/s 65B Evidence Act) 4.9. Ex CW1/I (legal notice for recovery of cheque amount dated 13.10.2018) 4.10. Ex CW1/J (colly) (postal receipt) 4.11. Mark A (colly) (Loan agreement) 4.12. Mark B (invoice for purchase of e-rickshaw) 4.13. Mark C (legal notice for recovery of amount of Rs 1,35,146/- from the accused dated 18.08.2018)

5. Thereafter, CW-1 was cross-examined.

6. In the statement of the accused under section 313 CrPC, he modified his defence disclosed at the stage of framing of notice under section 251 CrPC. At this stage, he denied having signed on the cheque in question. He also stated that he had not taken any loan from the complainant rather he had given his cheque to the dealer. He did not mention anything regarding the payments made by him to the complainant. He did not lead defence evidence.

7. During the course of final arguments Ld counsel for the complainant Sh. Bhaskar Pandey submitted that the complainant has duly proved his case by placing on record the entire Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 4 of 12 documentary evidence. He also submitted that the accused has failed to rebut the presumption against him and has admitted all of the ingredients of section 138 NI Act.

He prayed that the accused be convicted.

8. Per contra, Ld LAC for the accused Ms. Annu Sharma submitted that the cheque in question does not bear the signatures of the accused and therefore it cannot be said that the cheque has been issued by the accused. She also submitted that the accused has paid several instalments towards the loan in question and therefore he is liable to be acquitted. She also argued that since the e-stamp has been purchased many months prior to execution of loan agreement the same is not valid. She prayed that the accused be acquitted.

Legal Position:-

9. Before proceeding further to reflect upon the defence and evaluation of evidence, the foremost check point is whether the facts averred by the complainant fulfil the basic statutory requirement for constituting an offence under section 138 NI Act. To establish the offence under Section 138 of the NI Act against the accused, the complainant must prove the following:-

9.1. The accused must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

9.2. The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 5 of 12 9.3. That cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity whichever is earlier;

9.4. That cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;

9.5. The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

9.6. The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under section 138 NI Act.

10. It is apt to discuss that a negotiable instrument including a cheque carries following presumptions in terms of Section 118 (a) and Section 139 of the NI Act.

Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 6 of 12 Section 118 of the NI Act provides :

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

(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;"

Section 139 of the N.I Act further provides as follows:

"Presumption in favour of holder:- it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability"

Thus, the combined effect of Section 118(a) and Section 139 of NI Act raises a presumption in favour of the holder of the cheque that he has received the same for discharge, in whole or in part of any debt or other liability.

Whether presumption under section 118 (a) and 139 NI Act can be drawn against the accused

11. Evaluating the facts of the present case in the light of the above provision this court deems it fit to first consider as to whether it is prima facie proved that cheque in question was issued by the accused towards a legal liability in favour of the complainant from the account maintained by her, so as to constitute an offence under section 138 NI Act.

12. To carve out a prima facie case the complainant has filed on record original cheque as Ex. CW1/E. The said cheque was presented to the bank within a period of three months from the Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 7 of 12 date on which it was drawn and was returned dishonoured for the reasons "drawer's signature differs". The returning memo dated 09.10.2018 bearing the fact of dishonour of cheque in question has been exhibited by the complainant as Ex. CW1/F. The complainant then sent a legal notice, Ex CW1/I (colly) dated 13.10.2018 within the period of statutory requirement of 30 days from the date of receipt of information of dishonour. The original postal receipt dated 22.10.2018 has been placed on record as Ex CW1/I (colly).

13. In the present case the accused admitted his signatures on the cheque in question at the stage of framing of notice under section 251 CrPC but denied the same later on. However, perusal of record shows that the accused has been habitually using two different signatures. Moreover, the signatures done by him at the stage of recording his statement under section 313 CrPC is the same as that on the cheque in question. Further, he has not denied issuance of cheque towards the loan availed for purchasing the E-rickshaw. Certainly, such a cheque would have been accepted by the receiver (whether it was the dealer or agents of the complainant company) only if it was duly signed. Therefore, the plea of the accused that signatures do not belong to him appears to be a desperate and dishonest attempt to evade his liability.

14. The accused has also denied receiving the legal demand notice.

He has, however, admitted that the address mentioned thereon is his correct address. Therefore, since the legal demand notice was properly addressed and posted, it is presumed to have been delivered under section 114 Indian Evidence Act, 1872 Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 8 of 12 (hereinafter, "Evidence Act"). Moreover, in light of the decision of the Hon'ble Supreme Court of India in C C Alavi Haji v Palapetty Muhammad (2007) 6 SCC 555, the accused not having paid the amount of cheque in question within 15 days of service of summons to him, cannot be allowed to take such a plea.

15. These facts suffice in raising the presumption against the accused and in favour of the complainant.

16. When the presumption is raised in favour of the complainant, the burden is shifted on the accused to disprove the case of the complainant by rebutting the presumption. The accused can displace this presumption on the scale of preponderance of probabilities. Lack of consideration or a legally enforceable debt need not be proved beyond a reasonable doubt as is the general rule in criminal cases. The accused has to make out a fairly plausible defence which is acceptable to the court. This the accused can do either by leading his own evidence or by raising doubt /demolishing the material or evidence brought on record by the complainant. Reliance can be placed on Basalingappa v Mudibasappa (2019) 5 SCC 418.

17. Further, 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 possible nor contemplated. 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 Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 9 of 12 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. The accused may also rely upon circumstantial evidence to shift the burden again on the complainant. [Refer: Bharat Barrel and Drum Manufacturing Company v Amin Chand Pyarelal 1999 SCCOnline SC 188 and Kumar Exports v Sharma Carpets, 2008 SCC OnLine SC 1885].

18. Also, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof. Presumption of innocence as a human right needs to be delicately balanced with doctrine of reverse burden contained in section 139 of NI Act. [Reference can be made to Rangappa v Sri Mohan 2010 SCC OnLine SC 583 and Krishna Janardhan Bhat v Dattatreya G Hegde 2008 (4) SCC 54].

19. Having referred to the above judicial pronouncements, I shall now analyse the record in their light.

Whether the accused has been able to rebut the presumption against him.

20. In the present case, the accused has not disputed that he had taken a loan to purchase an e-rickshaw. In fact he has also admitted paying a few instalments towards the loan and defaulting on payment of remaining instalments. As per his own version he had Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 10 of 12 paid 6 instalments towards the loan whereas as per the account statement maintained by the complainant company they had received 5 such instalments. The accused has not led any cogent evidence to prove on a scale of preponderance of probabilities that he had actually paid such a 6th instalment. During the cross-examination of the AR of the complainant, no serious doubt regarding the veracity of the account statement could be created.

21. As far as the circumstance that the e-stamp has been purchased a few months prior to execution of the loan agreement, I am of the view that the same is not sufficient to rebut the presumption against the accused since availing the loan itself is not disputed.

22. Accused has also submitted that the loan was never provided to him rather it was disbursed to the dealer directly. This is also not a valid defence since this is an admitted position of the complainant that the loan was disbursed to the dealer only. There is nothing remotely improper in this conduct of the complainant as this is the general practice prevalent in such transactions. The accused has not disputed receiving the E-rickshaw. Therefore, once he has availed E-rickshaw on the basis of the loan provided by the complainant he cannot evade his liability merely on the ground that the loan was provided directly to the dealer. Therefore, the accused has miserably failed to rebut the presumption against him.

23. In view of the evidence adduced, documents put forth and arguments advanced by the parties and further in view of the above discussion, the court is of the considered view that the accused Sh Abdul Rahman is guilty of offence under Section Ct No.46916/2018 Uphar Finvest Ltd v. Abdul Rahman page no. 11 of 12 138 of Negotiable Instruments Act, 1881 and accordingly, he is hereby convicted under Section 138 of Negotiable Instruments Act, 1881.

Announced in open court on 03.05.2023 Digitally signed by APOORV Judgment consists of 12 pages. APOORV BHARDWAJ Date:

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