

And Branch Office At vs Surinder Kumar on 25 January, 2012

IN THE COURT OF SHRI ARUN KUMAR, METROPOLITAN
MAGISTRATE:DWARKA COURTS:NEW DELHI

CC NO: 586/10
Unique Case ID No: R0583542010

M/s ICICI Bank Ltd.
Regd. Office at:
"Landmark", Race Course Circle
Vadodara-390007

And Branch office At:
S.D.Tower, Sector-8
Rohini, New Delhi-110085Complainant

Versus

Surinder Kumar
Proprietor: Surendra Printers
326, Kucha Mir Ashiq
Chawri Bazar, New Delhi-110006Accused

Offence Complained of or proved	:	Under section 138 of Negotiable Instruments Act, 1881
Plea of the Accused	:	Pleaded not guilty
Date of filing	:	22.02.2010

ICICI Bank Ltd. v. Surinder Kumar
Judgment dated 25.01.2012
CC No. 586/10

Page 1 of 36

Date of Institution	:	02.03.2010
Date of reserving judgment/order	:	12.01.2012
Final Order/Judgment	:	Convicted
Date of pronouncement	:	25.01.2012

JUDGMENT:

BRIEF FACTS AND REASONS FOR THE DECISION OF THE CASE:□

1. Vide this judgment, I shall dispose of the present complaint u/s 138 of the Negotiable Instruments Act filed by the complainant against the accused.

2. The case of the complainant as per the complaint is that the complainant is a body corporate duly constituted under the Companies Act, 1956 and the accused availed credit/finance facilities from the

complainant in the form of RPA/SBL bearing account number 603805011593 in the name of his sole proprietorship firm Surendra Printers and in discharge of part of his debts/liability towards the complainant, issued a cheque bearing no. 770082 dated 02.01.2010 for ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 Rs. 6,60,000/- drawn on Central Bank of India with the assurance that the same shall be honoured on presentation. According to the complainant after getting the aforesaid assurance from the accused the complainant presented the aforesaid cheque for realization which was received back by the complainant as uncashed and dishonoured vide bank return memo dated 06.01.2010 with the remarks "funds Insufficient". Consequentially a legal notice dated 30.01.2010 was served by the complainant through its counsel upon the accused vide registered post AD dated 01.02.2010, calling upon the accused to make the payment towards cheque amount in question within 15 days of receipt of notice but the accused had failed to make the payment of cheque amount within the statutory period, hence the present complaint under Section 138 was filed by the complainant through Mr. Anuj Jain, its AR authorized vide Power of Attorney dated 03.11.2008 Ex. CW1/1.

3. The cognizance of offence under Section 138 of the Negotiable ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 Instruments Act, 1881 was taken and accused was summoned vide order dated 02.03.2010, whereupon the accused entered his appearance on 15.01.2011 and was admitted to bail. Thereafter, on the same date, separate notice u/s 251 Cr.P.C. explaining accusations against the accused u/s 138 of the NI Act was issued to the accused, to which he did not plead guilty and claimed trial.

4. The complainant has examined two witnesses in support of submissions made in the complaint. Mr. Anuj Jain, AR of the complaint has examined himself as CW1 and adopted his affidavit of pre-summoning evidence in its post summoning evidence also. Mr. Nitin Mahajan, Debt service manager of the Complainant's Green Park Branch has also examined himself as CW2 and has exhibited the loan agreement dated 30.12.2005 executed between the accused and the complainant. Complainant has relied upon the following documents: Ex. CW1/1 : Copy of Power of Attorney dated 03.11.2008 in favour of ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 the AR.

Ex. CW2/2 : Original Cheque no. 770082 dated 02.01.2010 for Rs. 6,60,000/- drawn on Central Bank of India in favour of complainant company.

Ex. CW3/3: Original Cheque return memo dated 06.01.2010. Ex. CW4/4: Copy of Legal Notice dated 30.01.2010. Ex. CW5/5 (Colly): Original Postal Receipt dated 01.02.2010 regarding dispatch of legal notice through registered post and AD Card. Ex. CW6/6: Complaint under section 138 of the NI Act. Ex. CW7/7: Copy of Statement of account of accused alongwith Certificate u/s 2A of Bankers' Books evidence Act. Ex. CW8/8 (Colly): Loan agreement dated 30.03.2007. Ex. CW9/9 (Colly): Loan agreement dated 30.12.2005.

Thereafter, on a separate statement of AR of Complainant, the complainant's evidence was closed vide order dated 20.09.2011. Statement of accused u/s 313 Cr.P.C. was recorded on 26.09.2011 and the matter was fixed for defence evidence.

5. The accused has examined himself, in his defence as DW□ after ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 moving an application in writing under section 315 of Cr.P.C. Thereafter, on statement of accused, defence evidence was closed on 16.12.2011 and the matter was listed for final arguments.

6. Thereafter, final arguments in the case were heard on 03.01.2012, 06.01.2012 and 12.01.2012 and in addition written submissions have also been filed on behalf of the accused. It is submitted by Ld. Counsel for the complainant that the complainant has proved beyond reasonable doubts all the ingredients of offence u/s 138 of the NI Act. According to him, the accused has not only admitted his signatures on the cheque EX.CW1/2 but has also admitted his signatures on both the agreements which are EX.CW1/8 and EX.CW2/1 respectively. Besides, the accused has admitted that he was owing certain liabilities towards the complainant, though, according to him, he was not aware of exact liability as on the date of presentation of the cheque. According to him it is further not in dispute that cheque EX.CW1/2 was dishonoured on ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 account of insufficiency of funds in the account of the accused and despite service of the legal notice, the accused has failed to make the aforesaid payment to the complainant, though as per the statement of account of the accused EX.CW1/7, the accused was liable to make a payment of more than Rs. 7,20,000/□as on 31.12.2009. Accordingly, it is further submitted by Ld. Counsel for the complainant that accused is liable to be convicted u/s 138 of the NI Act.

7. On the other hand, it is submitted by Ld. Counsel for the accused that the present complaint is not maintainable in view of the fact that the same has not been filed by the complainant through duly authorized representative in as much as board resolution in favour of executant of the Power of Attorney has not been placed on record by the complainant. Moreover, according to Ld. Counsel for the accused, under the alleged Power of Attorney EX.CW1/1, the alleged attorney holder is not authorised to depose/lead evidence in any Court of law, though certain ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 other powers have been given in the said document. It is further submitted by him that EX.CW1/1 bears the adhesive stamp dated 13.08.2008 whereas documents have been shown and signed on 03.11.2008 and as such, EX.CW1/1 has not been executed as per law since without having the proper signatures and date of execution a document cannot be adhesively stamped. Besides, there is no averment in the alleged power of attorney that particular person has been authorised by way of resolution passed by board of directors to execute the power of attorney or sub attorney in favour of the alleged AR. It is further submitted by him that from the contents of EX.CW1/1, it is not clear as to whether Mr. V Vaidyanathan and Mr. Nilesh Trivedi have signed as the persons authorized to execute the power of attorney or were merely the witnesses to the Board Resolution or to the execution of the document EX.CW1/1. Even otherwise it is submitted by Ld. Counsel for the accused that even if it is admitted that CW□ was the attorney holder ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 of the complainant, perusal of his examination in chief shows that the entire evidence is hearsay evidence and the witness had no knowledge regarding the present case and accordingly his testimony cannot be taken into consideration. Ld. Counsel for the accused has relied upon the following judgments in support of the aforesaid submissions.

a) Janki Vashdeo Bhojwani v. Indusind Bank Ltd. 2005 (1) RCR (Civil) 240 (SC)

b) Narender Nath Kapoor v. Prem Nath Khanna 2009(4) RCR (Civil) 515 (P&H)

c) M/s JCR Trading Pvt. Ltd. v. A.J. Verghese 2009 (1) RCR (Rent) 446 (Ker) DB

d) AIR 2005 Cal 118 While relying on the aforesaid decisions it is further submitted by Ld. Counsel for the accused that the AR of the complainant is not a competent witness and even if he is admitted to be a valid power of attorney holder he could not take the place of principle and cannot depose on the facts not within his personal knowledge and cannot be cross examined on these facts.

ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 It is further submitted by Ld. Counsel for the accused that on a perusal of testimony of CW□, it is clear that cheque was not issued by the accused in discharge of any legally enforceable debt or liability towards the complainant and the complainant has misused the cheque which was given by the accused to the complainant as a blank signed security cheque. According to him, CW□ has not even denied the suggestion given by Ld. Counsel for the accused to the effect that cheque in question was given by the accused to the complainant as blank signed security cheque and not in discharge of any legally enforceable debt or liability. It is further submitted by him that the accused has himself stepped into the witness box and deposed to the effect that the cheque was given by him to the complainant as a blank signed security cheque at the time of enhancement of the OD limit by the complainant. It is further submitted by Ld. Counsel for the accused that the alleged agreement EX.CW1/8 does not bear any seal of the complainant bank, nor does it contain ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 signatures of any of the officials of the complainant bank and as such, accused was not liable to make any payment to the complainant under the aforesaid agreement. According to him, even otherwise, the alleged agreement EX.CW2/1 had already expired on 27.12.2006 and no notice for renewal of the aforesaid agreement has been issued by the complainant to the accused probalising the defence sought to be raised by the accused that both sets of documents EX.CW1/8 and EX.CW2/1 had been signed by the accused at the instance of representative of the complainant somewhere during the year 2005. It is further submitted by Ld. Counsel for the accused that as per EX.CW1/8, the validity period of OD facility was expired on 21.02.2008 and after that date, there was no authority of the complainant to transact under the said document. Ld. Counsel for the accused has further sought to contend that the complainant has even failed to prove the service of legal notice on the accused in as much as the AD card placed on record by the complainant ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 does not bear the signatures of the accused. In view of the aforesaid contentions, it is prayed on behalf of the accused that the present complaint of the complainant may be dismissed and the accused may be acquitted of charges u/s 138 of the NI Act.

8. In view of the aforesaid submissions made by both the parties points that arise for determination by this court are as follows:□

a) Whether the present complaint is not maintainable as not filed by duly authorized representative of the complainant?

- b) Whether the legal notice under Section 138 of the NI Act has been duly served upon the accused?
- c) Whether the cheque in question was issued by the accused in discharge of any legally enforceable debt or liability towards the complainant?

I shall deal with the aforesaid points one by one.

- a) Whether the present complaint is not maintainable as not filed by ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 duly authorized representative of the complainant?

9. I have considered the rival submissions made on behalf of both the parties on the first issue and on a thoughtful consideration, I do not agree with the submissions made on behalf of the accused for reasons to follow. In the first instance, it would be pertinent to mention that the CW□ has produced the notarized power of attorney in favour of Mr. Anuj Jain and a copy of the same has been placed on record and in view of Section 85 of the Indian Evidence Act, there is no need to place on record any board resolution in favour of executant of power of attorney, since under the aforesaid provision a presumption arise in favour of a notarized power of attorney not only regarding its proper execution as per law but regarding the competency of the executant of such power of attorney. Even otherwise, the said power of attorney has been executed by the Complainant bank itself as the same bears the common seal of the complainant company which is a separate legal entity distinct from its ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 shareholders/directors. And as such the questions raised by Ld. Counsel for the accused regarding competency of Mr. Vaidyanathan and Mr. Nilesh Trivedi to execute the power of attorney does not arise in the present case. Moreover, the contention of Ld. Counsel for the accused that the aforesaid power of attorney, even if it is admitted to be one duly executed, does not empower the AR to depose on behalf of the complainant is not borne out on a perusal of aforesaid power of attorney in as much as para 5 of the power of attorney authorizes the AR to sign, verify and execute amongst other things affidavits for the purposes of any suit, complaint, action, appeals and proceedings of any kind whatsoever in any court of law. This power coupled with the relevant provisions of Negotiable Instruments Act, allows the AR of the complainant to lead evidence by way of affidavit consequentially giving rise to the right of other party to cross-examine him on the facts deposed by way of affidavit. So far as the contention of Ld. Counsel for the accused that ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 since the document Ex. CW□/1 bears an adhesive stamp dated 13.08.2008 while the document is purportedly executed on 03.11.2008, the same has not been executed as per law, is concerned, I fail to agree with the aforesaid submission. In my considered opinion the date mentioned in the stamp on the first page of Ex. CW□/1 is the date of purchase of e-stamp paper by the complainant and to my knowledge, there is no provision of law which requires a document to be executed on the same day on which the stamp paper is purchased by any person and hence the power of attorney is validly executed on 03.11.2008 though the stamp paper on which the same is executed was purchased on 13.08.2008. Thus in view of the aforesaid discussions the first question is answered in negative and in my considered opinion the complaint has been filed by the complainant through duly authorized representative. So far as the value of the testimony of the aforesaid witness regarding the facts not within his personal knowledge are concerned, the same shall be dealt ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 with under the subsequent heads where such testimony is found

to be having some significance.

b) Whether the legal notice under Section 138 of the NI Act has been duly served upon the accused?

10. So far as the second issue regarding service of mandatory legal notice is concerned, though the complainant has placed on record the office copy of legal notice and postal receipt regarding dispatch of legal notice to the accused alongwith AD card but since the AD card does not bear the signatures of accused, it is sought to be contended by Ld. Counsel for the accused that the legal notice has never been served upon the accused and as such the present complaint is liable to be dismissed. I do not find any force in the aforesaid submission made on behalf of the accused particularly in view of the fact that it has not been disputed by the accused that the address mentioned in the legal notice as well as AD card is not the correct address of the accused. Moreover, it is also not the ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 case of the accused that the legal notice and postal receipt regarding dispatch of legal notice are forged/fabricated documents. Thus in view of the aforesaid undisputed facts, a presumption regarding the due service of legal notice upon the addressee arises in favour of the complainant under section 27 of General Clauses Act and u/s 114 of Indian Evidence Act. Merely because the AD card bears the signatures of some one other than the accused does not mean that the legal notice has not been served upon the accused. If such a defence is accepted on behalf of the accused, it would be very easy for the accused in complaint cases u/s 138 of the NI act to avoid the criminal liability by not receiving the legal notice personally. Even otherwise, the aforesaid defence regarding non-service of legal notice does not lie in the mouth of the accused at this stage since the accused has failed to make the payment of cheque amount in question within 15 days of service of summons upon the accused alongwith the copy of complaint in terms of Judgment of Hon'ble Supreme Court in ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 C.C. Allavi Haji's case. Thus, the second question is answered in the affirmative.

c) Whether the cheque in question was issued by the accused in discharge of any legally enforceable debt or liability towards the complainant?

11. Before advertng to the third point for determination, it would be pertinent to reproduce the relevant provisions of Section 138, 139 and Section 118(a) and (b) of the Negotiable Instruments Act at the very outset, which reads as follows:□

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 provision of this Act, be punished ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless ☐

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation : ☐For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability."

139. 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.

118. Presumption as to negotiable instruments ☐Until the contrary is proved, the following presumptions shall be made: ☐ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012

(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) as to date ☐That every negotiable instrument bearing a date was made or drawn on such date;"

8. Issue regarding the scope of presumptions u/s 118(a) and u/s 139 of the NI Act has come up for consideration before the Hon'ble Supreme Court in a number of cases. It is no longer res ☐integra that in order to rebut the aforesaid presumption accused is not liable to step in to the witness box and the aforesaid presumption can be rebutted even by cross examination of the complainant's witnesses. The Hon'ble Supreme Court in Kundan Lal Rala Ram V. Custodian Evaccue Property, reported as AIR 1961 SC 1316 has laid down the proposition of law to the effect that in case of rebuttable presumptions burden of proof may be shifted on the presumption of law or the fact and presumption of law or presumption of fact may be rebutted not only by direct or circumstantial evidence but ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 also by presumption of law or fact.(Emphasis mine) The aforesaid observations have been quoted with approval by Hon'ble Supreme Court in its recent decision reported as M.S. Narayana Manon V. State of Kerala & Another AIR 2006 SC 3366. In the judgment of Kundan Ram Rala Ram Case (supra) the Hon'ble

Supreme Court has observed as follows: "8. Now let us apply this legal position to the facts of this case. In this case the appellant gave evidence before the Deputy Custodian. His evidence discloses the following facts : the appellant was doing business in radios and gramophones in Karachi in partnership with one Sarup Singh; he transferred his shop to his friend Iqbal Hussain with the consent of the landlord without consideration and the stock in trade for consideration to Abdul Satar Ahmedbhoy; he did not remember the name of the landlord whose permission he took before transferring the shop to Iqbal Hussain; he sold all his goods to Abdul Satar Ahmedbhoy who was a stranger to him and took from him a sum of Rs. 96,000 in cash and took from him an ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 endorsement in his favour of the promissory note for Rs. 37,000/ executed by another who was also a stranger to him; he prepared a list of articles in the shop at the time of valuation, but the list was not produced; he admitted that he had accounts and that they might be in Delhi, but did not produce them; he stated that the whole business was managed by his partner, Sarup Singh, and though the partner is alive and in India, he did not examine him as a witness. The aforesaid evidence discloses the circumstances under which the stock in trade of the appellant was transferred to Abdul Satar Ahmedbhoy and the promissory note was endorsed in his favour. It also establishes that the appellant had documentary evidence as well as oral evidence to prove that consideration passed but he wilfully withheld them. The said circumstantial evidence and the wilful withholding of the material evidence in the case would be legal evidence on the basis of which the custodian General held that the presumption raised under s. 118 of the Negotiable Instruments Act was rebutted. The Custodian General stated in his order as follows :

"It cannot be denied that prima facie a negotiable ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 instrument which had been endorsed shall be taken to have been drawn for consideration. But if there is evidence to prove that there was no consideration for the endorsement then there can be no presumption to that effect. As I have set out above the evidence and the circumstances of the case negative the fact that the promissory note was endorsed for consideration."

9. The proposition of law enunciated by the Custodian General is correct and on the basis of the relevant legal evidence he held that the presumption was rebutted. The order of the Custodian General is, therefore, correct both in law and in fact." (Emphasis mine)

12. In the present case, it is submitted by Ld. Counsel for the complainant that the present case is an open and shut case in as much as the accused has not only admitted his liability towards the complainant but has also admitted his signatures on the cheque in question. According to him, the accused has sought to raise a false defence to the effect that the cheque was given by him to the complainant as a blank signed cheque as security at the time of enhancement of OD limit in his favour in the year 2008. According to him, the accused has failed to probabalise the ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 aforesaid defence even by preponderance of probabilities and as such the presumptions arising under Section 139, 118(a) and 118(b) of the

Negotiable Instruments Act in favour of the complainant, regarding issuance of cheque on the date mentioned in the cheque in discharge of his legally enforceable debt/liability towards the complainant, stood un rebutted even independent of the testimony of AR of the complainant.

13. I find force in the aforesaid submissions made on behalf of complainant. In the present case, admittedly the accused had availed the OD facility from the complainant which was subsequently enhanced from Rs. 6,00,000/- to Rs. 6,60,000/- and despite the fact that he was owing certain liabilities towards the complainant, he had not made any payment towards the cheque amount in question to the complainant after dishonour of the aforesaid cheque. The only plausible defence sought to be raised by the accused is that the cheque in question was not issued by the accused in favour of the complainant in discharge of aforesaid legally enforceable ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 debt/liability but was given by him to the complainant as blank signed security cheque at the time of enhancement of OD limit in the year 2008 which has subsequently been misused by the complainant. In order to establish the aforesaid defence, the accused has not only relied upon the testimony of AR of the complainant to the effect that he had no personal knowledge regarding the exact date of handing over of cheque in question by the accused but also stepped into the witness box and has examined himself on oath. Accused has testified during his examination in chief that the cheque was given by him to the complainant in the year 2008 as blank signed security cheque and not under the circumstances alleged by the complainant. However, the aforesaid testimony of the accused could not withstood the test of cross examination by Ld. Counsel for the complainant. During the cross examination of the accused, it has been stated by the accused that he had given the cheque EX.CW1/2 to the complainant on 25.03.2008 at the time of signing the agreement, while ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 during his examination in chief, he had deposed that on 30.12.2005, two sets of documents were got signed by the complainant from him while all the columns in the aforesaid documents were blank. Thus, on the one hand the accused has deposed that he did not sign any loan agreement with the complainant bank at the time of enhancement of OD limit on 25.03.2008 while on the other hand, it is deposed by him that the cheque was given by him to the complainant on 25.03.2008 at the time of signing of the agreement. In view of the aforesaid contradictory statements, a Court question was put to the accused to elicit the fact regarding the agreement at the time of signing of which the accused has handed over the cheque EX.CW1/2 to the complainant, to which the accused has replied that the cheque was given by him to the agent of the complainant on 25.03.2008 as a security cheque. In response to the another question of Ld. Counsel for the complainant, it was admitted by the accused that he had not verified the identity of the person to whom the cheque in ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 question has been handed over by him. It is further admitted by him that he did not demand any receipt at the time of handing over of the aforesaid cheque to the alleged agent of the complainant bank. Accused has further admitted that no reasonable person would have given the blank documents as well as the blank signed cheque to any person without satisfying himself about the identity of that person. Therefore, in view of the aforesaid facts, it is hard to believe that the accused had handed over the cheque Ex. CW1/2 to the alleged agent of the complainant in March 2008.

14. The accused has further produced the record slips Ex. DW1/A, maintained by him regarding the issuance of various cheques from time to time, to show that the cheque EX.CW1/2 had been

given by him to the complainant as blank signed security cheque on 25.03.2008. However, in the aforesaid record slips EX.DW1/A, no entries have been made by the accused in respect of cheques subsequent to the cheque number 770083. ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 Though the accused has deposed in his cross examination that he had not utilized the cheques subsequent to cheque no. 770083 but the accused has failed to produce the aforesaid cheque leaves during his cross examination. It is submitted by Ld. Counsel for the accused that the complainant had not required the accused to produce the said cheque leaves despite the fact that the accused has stated that he can produce the same if required and accordingly an adverse inference can be drawn against the complainant in this regard. On the other hand, it is submitted by Ld. Counsel for the complainant that the onus was on the accused to prove the bonafides of his submissions and since he has not produced the remaining cheque leaves, an adverse inference may be drawn against the accused that the said cheque leaves were already utilized by the accused without making any entries in the record slips. According to Ld. Counsel for the complainant, since the entry in respect of cheque Ex. CW□/2 is the second last entry in the said record slips, and single entry has been ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 made in respect of issuance of cheques bearing nos. 770023 and 770082, it can be safely presumed that the aforesaid entries have been made by the accused just to create false evidence in order to avoid his conviction. Ld. Counsel for the complainant has sought an explanation from the accused as to why the cheque bearing no. 770023 has been issued by the accused subsequent to the cheque no. 770024, to which the accused has replied that merely because entry pertaining to cheque no. 770023 has been made subsequent to cheque nos 770024 to 770081 does not mean that the cheque bearing no. 770023 has been issued by him on a subsequent date. It is further submitted by the accused that he might have forgotten to make the entry in respect to the aforesaid cheque and that is the reason he would have made the entry on a subsequent date.

15. I have considered the aforesaid submissions made on behalf of both the parties and have carefully gone through the entire testimony of the accused and in my considered opinion not much value can be attached to ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 the aforesaid record slips to ascertain the actual date of issuance of cheque in question for the following reasons:

a) Firstly, the document EX.DW1/A does not seem to be a record maintained by the accused in the ordinary course of his business, particularly in view of the fact that admittedly the entries have not been made by the accused simultaneously with the issuance of cheques in favour of any person and the accused is making the entries in the record slips as per his own convenience.

b) Secondly, the entry pertaining to cheque in question is the second last entry in the aforesaid record slips and neither any entry regarding the issuance of cheques subsequent to Cheque no.

770083 has been made in the record slips nor the aforesaid cheque leaves, if unutilized, have been placed on record by the accused.

c) Thirdly, there is only one single entry in respect of two ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 cheques bearing nos. 770023 and 770082 on 25.03.2008 which raises serious doubts as to the genuineness of Ex. DW□/A.

16. It may further be noted that there is a presumption in favour of the complainant u/s 118(b) of the Negotiable Instruments Act to the effect that a cheque should be presumed to have been drawn on the date mentioned in the aforesaid cheque. Although the aforesaid presumption is a rebuttable presumption of law, but the accused has failed to rebut that presumption by leading any evidence to the effect that the cheque was handed over by the accused to the complainant on some other date than the date mentioned in the aforesaid cheque. As has already been observed, in view of contradictions in the testimony of accused, even the deposition of the accused that the cheque was handed over by him to the complainant on 25.03.2008 is not trustworthy. Thus even if the testimony of CW□ Mr. Anuj Jain regarding the handing over of cheque EX.CW1/2 by the accused to the complainant is left out of consideration considering ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 it to be a piece of hearsay evidence, in view of the presumption u/s 118(b) and 139 of the Negotiable Instruments Act and in view of admission by the accused of his liability towards the complainant and of his signatures on the cheque EX.CW1/2, the complainant has proved that the cheque EX.CW1/2 was issued by the accused in favour of the complainant in discharge of legally enforceable debt or liability towards the complainant. The accused has failed to raise any reasonable doubt against the proof of the aforesaid facts by the complainant.

17. Ld. Counsel for the accused has further submitted that since the agreement EX.CW1/8 does not bear the seal and signatures of the complainant, the same cannot give rise to any legally enforceable liability of the accused towards the complainant. I fail to agree with the aforesaid submission made on behalf of the accused in view of the fact that despite the absence of signatures/seal of the complainant on the renewal agreement, the agreement has been duly acted upon by both the parties ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 and accused has admitted his signatures on the same. Moreover, the accused has not disputed his liability towards the complainant as reflected in the statement of account EX.CW1/7 although he pleaded ignorance about his exact liability towards the complainant.

18. It is further sought to be contended on behalf of the accused that the original agreement had already expired on 27.12.2006 and admittedly the same was not renewed up to 30.03.2007, which goes on to prove that both the agreements were signed by the accused simultaneously. I fail to agree with even the aforesaid submissions made on behalf of the accused in view of the fact that signatures on either of the loan agreements has not been denied by the accused and a perusal of the stamp paper used in both the agreements EX.CW1/8 and EX.CW2/A shows that both the stamp papers have been purchased by the accused on different dates. While, the stamp paper, on which the agreement EX.CW1/8 has been executed, was purchased by the accused on 29.03.2007, stamp paper in respect of the ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 loan agreement EX.CW2/A was purchased by him on 30.12.2005.

19. It is further submitted by Ld. Counsel for the accused that even as per EX.CW1/8 the validity period of OD facility has already expired on 21.02.2008, there was no authority to either of the

parties to transact under the said account after 21.02.2008, and as such the alleged sum of RS. 6,60,000/- could not have been recovered by the complainant from the accused. Once again the aforesaid contention made on behalf of the accused is liable to be rejected in view of the fact that merely because the tenure of the OD limit has expired, the liability under the aforesaid agreement does not become extinct particularly when this is not the case of the accused that the liability under the aforesaid OD facility has already become time barred as on the date of presentation of the aforesaid cheque.

20. In view of the aforesaid discussions the third question is answered ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012 in the affirmative.

21. To sum up, the complainant has proved beyond reasonable doubts that the cheque Ex. Cw-2 was issued by the accused in favour of the complainant towards legally enforceable debt/liability and despite service of the legal notice, the accused has failed to make the payment towards cheque amount till date and the present complaint has been filed by the complainant through duly authorized representative. There is no doubt about the legal proposition set out in the judgments relied upon by Ld. Counsel for the accused that while deposing before any court of law, AR cannot take place of the principal and as such cannot depose about the facts which are not in his personal knowledge. But in my considered opinion the personal knowledge of the AR can always be based on relevant records maintained by the complainant and if the AR has produced the relevant records on the basis of which he has deposed before the court and the aforesaid documents/records have been duly proved as per the provisions of Evidence Act, the deposition of AR of the complainant to that extent cannot be termed as hearsay evidence. In the present case, I have already observed that even if we leave the testimony of the AR on those aspects which are not within his personal knowledge still the complainant has proved beyond reasonable doubts all the ingredients of offence under Section 138 of the NI Act against the accused and as such accused is hereby convicted of offence under Section 138 of the Negotiable Instruments Act.

22. Ordered Accordingly.

Pronounced in the Open Court on this 25th day of January 2012. This Judgment consists of 36 signed pages.

Copy of this Judgment be given to the convict free of cost.

(ARUN KUMAR) Metropolitan Magistrate: Dwarka Courts ICICI Bank Ltd. v. Surinder Kumar Judgment dated 25.01.2012