

Jasbir Singh vs . Yadu Shukla Cc No. 4988852/16 Page No. 1 ... on 2 February, 2019

IN THE COURT OF MR. MRIDUL GUPTA, METROPOLITAN MAGISTRATE,
SOUTH-WEST, DWARKA, DELHI

In Re:
CNR No. DLSW02-000121-2013
CC No. 4988852/16

Jasbir Singh
S/o Sh. Chander Bhan,
R/o House No. 6,
Village Kakrola,
Delhi-110078

.....Complainant

Versus

Yadu Shukla
W/o Sh. J.M.Shukla,
R/o A-301, Manisha Towers,
Plot No. 7B, Sector-23, Dwarka,
New Delhi-110075

Also At;
Room No. 168, H-Block,
Ministry of Defence,
Near Vijay Chowk, India Gate,
New Delhi-110001

.....Accused

- | | | | |
|-----|----------------------------------|---|--------------------|
| (1) | Offence complained of or proved | : | 138 N.I. Act |
| (2) | Plea of accused | : | Pleaded not guilty |
| (3) | Date of institution of case | : | 23.08.2013 |
| (4) | Date of conclusion of arguments: | | 15.12.2018 |

Jasbir Singh Vs. Yadu Shukla
(5) Date of Final Order

CC No. 4988852/16
: 02.02.2019

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(6) Final Order : Convicted

JUDGMENT

1. Vide this judgment I shall dispose of the complaint filed by the complainant under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'Act ').

2. Brief facts relevant for the decision of the case are as under:-

The complainant alleges that the accused approached him for friendly loan of Rs.1,30,000/- for school fees of her son and on 07.11.2012, complainant advanced friendly loan of an amount of Rs. 1,30,000/- to the accused with promise to return the same on or before 06.05.2013. Accused also gave one cheque of Rs. 1,30,000/- i.e. cheque in question bearing no. 486111 dated 06.05.2013 drawn on Axis Bank, New Delhi to complainant as security for repayment of loan. It is alleged that accused did not repay the loan on or before 06.05.2013. It is also alleged that accused intentionally issued a mutilated and torn cheque, so that the same would not be accepted by bank, due to which, the banker of complainant returned the cheque twice. It is alleged that accused refused to meet with the complainant. Thus, finding no other option, the complainant presented the cheque in his account maintained at Punjab National Bank, Kakrola, Delhi which was returned with the remarks "Drawers Signature Differs" vide bank return memo dated 08.07.2013. Complainant also lodged complaint against the accused dated 12.07.2013 with SHO, PS Dwarka North, for fraud and cheating. Thereafter, complainant served a legal notice under section 138 of the Act, dated 27.07.2013 upon the accused through his counsel demanding the said amount. Despite service of aforesaid notice, neither any reply was sent nor the money was repaid by the accused. Thereafter, complainant has Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 2 of 13 filed the present complaint case under section 200 Cr.P.C and Section 138 of the Act r/w Section 142 of the Act, for offences U/s 420/467/468 of IPC and Section 138 of the Act, with the submission that accused be summoned, tried and punished according to law.

3. In his pre-summoning evidence, complainant examined himself as CW-1 on 10.12.2013. He reiterated the contents of complaint and placed on record, original agreement dated 07.11.2012 as Ex.CW1/A, original cheque of Rs. 1,30,000/- i.e. cheque in question bearing no. 486111 dated 06.05.2013 drawn on Axis Bank, New Delhi as Ex. CW-1/B, cheque returning memo dated 08.07.2013 as Ex. CW-1/C, Police complaint with SHO PS Dwarka North vide DD entry No. 55B as Ex.CW1/D, legal demand notice dated 27.07.2013 as Ex.CW-1/E, Postal receipts as Ex. CW-1/F and Ex.CW1/G, tracking reports as Ex.CW1/H and returned envelope as Ex.CW1/I and complaint as Ex.C-1.

4. Upon appreciation of pre-summoning evidence, accused was summoned for an offence punishable under Section 138 of the Act as well as for offence of cheating, vide order dated 21.12.2013 of Ld. Predecessor of this court. Upon entering appearance accused was granted bail vide order dated 27.05.2014. Thereafter, in pre-charge evidence dated 31.03.2015, complainant again examined himself as CW-1. He reiterated his version as stated in complaint and relied upon the documents already Ex.CW1/A to Ex.CW1/I as detailed hereinabove. Complainant as CW-1 was duly cross examined by Ld. Counsel for the accused on 02.06.2015 and 15.09.2015. Thereafter, vide order on charge dated 27.07.2016 of Ld. Predecessor of this court, it was held that no offence of cheating was made out against the accused and matter was fixed for framing of notice U/s 138 of the Act.

5. Notice under Section 251 Cr.P.C. for offence U/s 138 of the Act was framed upon accused on 30.08.2016 to which she pleaded not guilty and claimed trial. She stated that she had given the cheque to Sh. Jaswant Singh Gehlot, elder brother of the complainant as security from whom she had taken loan of Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 3 of 13 Rs.1,00,000/-. She denied receipt of legal notice. She stated that she had repaid all the amount to Jaswant Singh and did not owe any money to present complainant.

6. At the trial, complainant examined himself as CW-1, by way of affidavit Ex.CW1/A1 and also relied upon the documents already placed on record i.e. Ex.CW1/A to Ex.CW1/I. The accused moved an application to cross-examine the complainant. Complainant as CW-1 was duly cross examined by the accused. No other witness was produced by the complainant and he closed his evidence by giving a separate statement to this effect. Thereafter, statement of accused under Section 313 Cr.P.C. was recorded in which all the incriminating evidence were put to her to which accused stated that she had not taken any loan from the complainant and had seen the complainant first time in court. She denied executing any agreement with the complainant. She admitted her signatures on the cheque, however, denied filling in all the remaining details. She reiterated her version that the cheque alongwith other cheques were given as blank signed security cheques to Sh. Jaswant Singh, elder brother of the complainant for loan of Rs.1,00,000/- taken from him. The loan was repaid, however, the cheques were not returned to accused. She denied receipt of legal demand notice.

7. Accused preferred to lead evidence in her defence and had examined herself as DW-1. She also examined Sh. Jaswant Singh as DW-2 and one Sh. Dharmesh Bansiwal as DW-3. All the witnesses were cross-examined by counsel for complainant. The accused did not examine any other witness and vide her statement, defence evidence was closed.

8. Thereafter, matter was listed for final arguments. It was argued by the Ld. counsel for the complainant that this is a fit case for conviction of the accused as all the essential ingredients of Section 138 of the Act read with Section 139 of the Act have been fulfilled and that the same has been aptly demonstrated by the complainant before the court. It was argued that accused admitted her signature on the cheque in her statement U/s 313 Cr.P.C and also did not deny her signatures on the cheque throughout trial. He argued that accused never gave Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 4 of 13 reply to the legal demand notice. He also argued that accused admitted her signature and photo on the agreement Ex.CW1/A whereby she acknowledged taking of loan of Rs.1,30,000/- from the complainant and giving the cheque in question to him. He also

argued that the transaction with Sh. Jaswant Singh was a separate transaction and had nothing to do with present case. He also argued that stamp paper for Ex.CW1/A is dated 03.11.2012, whereas as per version of accused, the transaction with Jaswant Singh was over by September-October, 2012, therefore, the present stamp paper had nothing to do with transaction of Jaswant Singh with accused. It was argued that accused failed to raise the probable defence to disprove the case of complainant and to rebut the presumption under Section 139 NI Act. Therefore, accused be convicted for the offence under Section 138 of the Act.

9. Per contra, on behalf of accused, it was argued that he never took any loan from the complainant. Ld. Counsel reiterated the submissions made by accused in his plea of defence at the time of framing of notice under Section 251 Cr.P.C and in his statement under Section 313 Cr.P.C as well as in defence evidence that the amount of Rs. 1 lacs of loan was taken by her from Jaswant Singh, elder brother of the complainant and cheque in question was given to him. He maintained that accused had repaid entire loan to Jaswant Singh, whereas the cheque in question was misused by the complainant. He argued that though Jaswant Singh was witness to the agreement Ex.CW1/A, he was not examined as witness by the complainant. He also argued that as per version of the complainant, he first met the accused on 07.11.2012 and advanced the loan in question to her on same date itself. He also argued that complainant in his cross examination, could not show sufficient sources to advance the present loan. He also argued that when Sh. Jaswant Singh i.e. brother of the complainant was also put to trouble by the accused for recovery of loan given to her and had to issued legal notice to her, there was no occasion for complainant to advance loan to accused later on. It was argued that all these above factors, cast doubt on the case of the complainant. He argued that evidence of complainant suffered from material lapses and was not sufficient to establish the case against accused. He submitted that complainant Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 5 of 13 has failed to prove his case beyond reasonable doubt and accused is entitled to be acquitted of offence u/s 138 of the Act.

10 I have perused the entire record as well as evidence led by the complainant as well as by the accused.

11. Before appreciating the facts of the case in detail for the purpose of decision, let relevant position of law be discussed first:-

For the offence under Section 138 of the Act to be made out against the accused, the complainant must prove the following points, that:-

1. the accused issued a cheque on account maintained by him with a bank.
2. the said cheque had been issued in discharge, in whole or in part, of any legal debt or other liability.
3. the said cheque has been presented to the bank within a period of three months from the date of cheque or within the period of its validity.

4. the aforesaid cheque, when presented for encashment, was returned unpaid/dishonoured.

5. the payee of the cheque issued a legal notice of demand to the drawer within 30 days from the receipt of information by him from the bank regarding the return of the cheque.

6. the drawer of the cheque failed to make the payment within 15 days of the receipt of aforesaid legal notice of demand.

12. The Act raises two presumptions in favour of the holder of the cheque i.e. Complainant in the present case; firstly, in regard to the passing of consideration as contained in Section 118 (a) and secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability.

Section 118 of the N.I 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, Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 6 of 13 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".

13. For the offence under Section 138 of the Act, the presumptions under Sections 118(a) and 139 have to be compulsory raised as soon as execution of cheque by accused is admitted or proved by the complainant and thereafter burden is shifted to accused to prove otherwise. These presumptions shall be rebutted only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability etc. A presumption is not in itself evidence but only makes a prima facie case for a party for whose benefit it exists. Presumptions both under Sections 118 and 139 are rebuttable in nature. Same was held by the Hon'ble Supreme Court of India in Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16].

14. In the present case, accused has admitted her signatures on the cheque in question in her statement U/s 313 Cr.P.C. She did not deny her signature on the cheque either in cross-examination of complainant, or in defence evidence. Reference can be made to Judgment of Apex Court in Rangappa v. Mohan, AIR 2010 SC 1898, that, "Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as

contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant."

Also in the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan 1999 (4) RCR (Criminal) 309, it has been held by the Hon'ble Supreme Court as under:

"As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the court to presume that the holder of the cheque received it for the Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 7 of 13 discharge of any debt or liability."

It has been held in M/s. Kumar Exports v. M/s. Sharma Carpets, [2009 A.I.R. (SC) 1518] that the accused may rebut these presumptions by leading direct evidence and in some and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Further, the burden may be discharged by the accused by showing preponderance of probabilities and the onus on the accused is not as heavy as it is on the complainant to prove his case. In light of aforesaid legal position, let us carry out a scrutiny of the evidence led at the trial.

15. In the present case, the complainant by way of an affidavit led his own evidence testifying that cheque was issued to him upon advancing loan of Rs. 1,30,000/- to the accused. The agreement of loan, cheque in question, dishonour memo of the cheque and legal demand notice were exhibited on record.

16. The principle defence taken by the accused as brought out from her testimony as DW-1 as well as testimonies of DW-2 i.e. Jaswant Singh and DW-3 i.e. Dharmesh Bansiwala, is that she did not know the complainant. She had taken loan of Rs.1,00,000/- @ 3% p.m. from Jaswant Singh, elder brother of the complainant in early 2012 and given three cheques including present cheque to him as blank signed security cheques. She also gave 2-3 blank signed papers, blank signed stamp paper, 1-2 photos, electricity bills, payslip and copy of her I- card to brother of the complainant. When she could not repay the loan, Jaswant Singh presented one of the cheques and same was dishonoured. After that in September-October, 2012, she repaid Rs.1,00,000/- in cash to Jaswant Singh towards settlement of their account and he returned her the dishonoured cheque. However, the other two cheques including the cheque in question were not returned as same were stated to be misplaced and Jaswant Singh told her that same shall not be misused.

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17. However, perusal of the above testimony of accused shows that her version does not bring out a credible defence. Though, the version of accused that she had taken and repaid loan of Rs.1,00,000/- to Jaswant Singh is also endorsed by DW-2 and DW-3. However, accused could not show as to how the present loan transaction is connected with the loan taken from Jaswant Singh,

which transaction was over, prior in time to present loan. It is also pertinent to note that accused has admitted her signatures on the loan agreement Ex. CW1/A whereby she has acknowledged taking loan of Rs.1,30,000/- from the complainant on 07.11.2012. Though it is version of accused that document was taken as blank signed stamp paper by Jaswant Singh, however, she did not place on record any material to show that she had filed any complaint against Jaswant Singh or the complainant for forgery or misuse of the blank signed stamp paper. It is also pertinent to note that the stamp paper over which Ex.CW1/A has been prepared is dated 03.11.2012, whereas as per testimony of accused i.e. DW-1, the loan from Jaswant Singh was taken in early 2012 and the blank signed stamp paper was also given at the time of taking loan. It is also her version that the loan was thereafter repaid and settled in September-October, 2012. Therefore, it is not conceivable as to how stamp paper dated 03.11.2012 was taken by Jaswant Singh as blank signed stamp paper. The same casts serious doubts on credibility of the version of accused.

18. Also as per version of accused, the loan was repaid to Jaswant Singh in September-October, 2012 and the cheque in question was not returned to her as it was stated to be misplaced and it was assured that same would not be misused. However, the cheque in question has been dishonored vide cheque returning memo dated 08.07.2013 for reason "Drawers Signature Differs" (Ex. CW-1/C) and not for any other reason, though accused has even admitted her signatures on the cheque. There is no explanation or evidence as to why, if the cheque was not returned to accused even after repayment of loan, stop payment instructions were not issued by accused to bank. Accused also did not furnish any explanation as to why she did not given any written notice to Jaswant Singh for return of her cheques. Also, if as per version of accused, the cheque was misused despite Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 9 of 13 assurance of Jaswant Singh, accused did not produce any material regarding any complaint filed against him or complainant, for misuse of cheque in question. In light of above, this court is of the view that simple averment of misuse of the cheque is not a credible defence.

19. Ld. Counsel for accused also argued that the complainant in his cross examination stated that his monthly income was Rs.16000/- - Rs.17,000/-, whereas his monthly expenditure was Rs.10,000/- to Rs.12,000/-. He also argued that as per bank statement produced by the complainant, Ex.CW1/D3 (in cross examination dated 15.09.2015), bank balance of complainant on 07.11.2012 i.e. date of advancing loan was only Rs.7142/-. He also argued that as per version of complainant (cross examination dated 02.06.2015), the amount for advancing present loan was available with complainant as he had taken a committee of Rs.1,50,000/- in October, 2012. However, complainant did not produce any document or proof of amount realized through any such committee. He also argued that there was no occasion for complainant to advance loan to accused upon their first meeting on 07.11.2012, more so, when accused had already caused trouble to brother of complainant for recovery of the latter's loan. He argued that though Jaswant Singh was witness to the agreement Ex.CW1/A, he was not examined as witness by the complainant. It was argued that all these facts and circumstances casts doubt on case of complainant.

20. However, these arguments of Ld. Counsel for accused are also devoid of substance as they are not sufficient to rebut the statutory presumptions under the Act. Perusal of the evidence shows that accused has admitted her signature on the loan agreement dated 07.11.2012 whereby she has

acknowledged taking loan of Rs.1,30,000/- from the complainant and also giving the cheque in question to him as security for repayment of the loan. As discussed above, accused could not produce any material to substantiate her version that same was given as blank signed stamp paper to brother of the complainant, and has been misused. Also as admitted by accused the transaction with Jaswant Singh was over prior in time to present loan agreement. Thus mere omission to examine Jaswant Singh as Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 10 of 13 witness to the agreement or to produce any document of amount realized from committee and the other circumstances as set out by Ld. Counsel for accused, do not cast a reasonable doubt on case of complainant.

Furthermore, reliance in this regard can also be placed on decision of Hon'ble High Court of Delhi, in Sanjay Arora V. Monika Singh, Crl. Appeal No. 98/2017, dated 31.05.2017, wherein it was observed:

"Mere admission of the complainant that he was earning only Rs. 12,000 per month from small business or his failure to file income tax returns, or his omission to produce the bank passbook or to examine Chhotu as a witness in corroboration, are inconsequential. In order to rebut the statutory presumption, it was the burden of the respondent to prove the facts she had pleaded in answer to the notice under Section 251 Cr.P.C. No material in support of such plea having come on record, the statutory presumption under Section 139 Negotiable Instruments Act in the case at hand has not been rebutted."

In the present case also the defence taken by the accused is that she had repaid the loan taken from brother of the complainant and the blank signed security cheques and blank signed stamp paper has been misused. However, she has failed to produce any material in support of her plea of defence. The accused was also not able to elicit anything in cross examination of complainant to doubt his version regarding advancement of loan or to substantiate her own version regarding misuse of cheques.

21. The accused has also denied that legal demand notice under section 138 of the Act was received by her. However, it is worth noting that the address of the accused as mentioned in legal demand notice is the same address as that in her statement of accused under section 313 Cr.P.C, testimony as DW-1 and her bail bonds i.e. A-301, Manisha Towers, Plot No. 7B, Sector-23, Dwarka, Delhi. Moreover the accused has not brought on record any evidence to show that she was not residing at above address at time of legal notice. The above shows that legal notice was sent at correct address of accused. Once the legal notice is proved to be sent by post to correct address of accused then the presumption u/s 27 of General Clauses Act, 1897 arises and it shall be presumed unless proved contrary, that legal notice sent to address of accused was delivered to him. In M/s Jasbir Singh Vs. Yadu Shukla CC No. 4988852/16 Page no. 11 of 13 Darbar Exports and Ors. Vs. Bank of India, 2003 (2) SCC (NI) 132 (Delhi), the court held that a presumption of service of notice is to be drawn where the notice is sent through registered post as well as UPC on correct address. In the light of the same the legal notice is deemed to have been served upon the accused. The accused has failed to adduce any evidence to rebut the presumption of due service. As such, the legal notice stood served upon

the accused but no payment was made despite the service nor any reply sent to the same. In Rangappa v. Mohan (supra), the Apex Court held:

"Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version."

The decisions in Santosh Mittal v. Sudha Dayal, 2014 (8) AD (Delhi) 268, and G.L. Sharma v. Hemant Kishor 2015 (2) AD (Delhi) 340, are also to the same effect.

22. Moreover as per the dicta of Apex Court in C.C. Alavi Haji vs Palapetty Muhammed & Anr, 2007 Cr. L.J. 3214, If the accused did not receive the legal notice, he could have made payment of the cheque amount within 15 days of receipt of summons from this court and could have prayed for rejection of the complaint, but this course of action has not been adopted by accused. Hence the defence of non-service of legal notice is without substance.

23. In view of the above, this court is of the considered opinion that apart from not raising a probable defence, the accused was not able to contest the existence of a legally enforceable debt or liability. The complaint disclosed the existence of a legally enforceable debt or liability vide the cheque in question, return memo and the legal notice brought on record. However, accused failed to rebut the presumption in favour of complainant either on the basis of other material available on record or by adducing any defence evidence. There is sufficient material on record to conclude that complainant has successfully proved his case beyond reasonable doubt.

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24. Accordingly, the accused is convicted for the offence under Section 138 of Negotiable Instruments Act, 1881.

25. Let the convict be heard on quantum of sentence.

26. Copy of Judgment be supplied to the convict free of cost.

ANNOUNCED IN THE OPEN COURT
TODAY i.e. 02nd FEBRUARY 2019

MRIDUL GUPTA
GUPTA
Date:
2019.02.02
14:56:34 +0530
(MRIDUL GUPTA)
METROPOLITAN MAGISTRATE
DWARKA DISTRICT COURTS/ DELHI