

Sachin Bahmba vs . Amrita Bhasin Cc No. 4993570/16 Page ... on 29 August, 2018

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

In Re:
CNR No. DLSW02-003141-2016
CC No. 4993570/16

Sachin Bahmba
S/o Sh. V.P. Bahmba,
R/o DB-42, Hari Nagar,
New Delhi - 64

.....Complainant

Versus

Amrita Bhasin
W/o Sh. K.R. Bhasin,
R/o B-4/219, Safdarjung Enclave
New Delhi - 29

.....Accused

- | | | | |
|-----|----------------------------------|---|--------------------|
| (1) | Offence complained of or proved | : | 138 N.I. Act |
| (2) | Plea of accused | : | Pleaded not guilty |
| (3) | Date of institution of case | : | 09.08.2010 |
| (4) | Date of conclusion of arguments: | : | 28.07.2018 |
| (5) | Date of Final Order | : | 29.08.2018 |
| (6) | Final Order | : | Convicted |

Sachin Bahmba Vs. Amrita Bhasin

CC No. 4993570/16
JUDGMENT

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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 he knows the accused through one Sh. H.N. Sharma. It is alleged that vide written agreement dated 07.03.2006, complainant gave loan of Rs. 10,50,000/- to the accused, for which accused gave him five cheques dated 08.04.2006 of Rs. 2,10,000/- each in discharge of her liability. However, before 08.04.2006, the accused approached complainant stating she was not in position to refund the amount and that she will pay interest on the amount. Thereafter vide written agreement dated 30.03.2006, accused agreed to give interest @ 12% p.a. on the amount which was to be repaid on or before 31.03.2010. It is alleged that accused also mortgaged her property bearing no.

UGF-3, UG Floor, Mohta Building 4, Bhikaji Cama Place, New Delhi - 66, with the complainant by giving original documents of the same. In January 2010, the accused gave three cheques of Rs. 1,00,000/- each, i.e. cheques in question bearing no. 824518, 824520 and 824519 dated 15.01.2010, 15.02.2010 and 31.01.2010 respectively, all drawn on Central Bank of India, Gulmohar Park, Delhi to complainant in satisfaction of loan, with an assurance of its encashment. After due date of cheques in question, the complainant presented the cheques in his account maintained at Bank of Maharashtra, Sector 10, Dwarka, Delhi, which were returned with the remarks "Payment Stopped by Drawer", "Funds Insufficient/Exceeds Arrangement" and "Payment Stopped by Drawer", respectively, vide bank return memos dated 09.06.2010, 16.06.2010 and 11.06.2010. Thereafter, complainant served a legal notice dated 30.06.2010 upon the accused through his counsel demanding the said amount. Reply dated 13.07.2010 to the legal notice was sent by the accused whereby she denied any acquaintance with the complainant and stated that cheques in question of Rs. 1,00,000/- each, were given as blank cheques to Sh. H.N. Sharma, as advance Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 2 of 12 for a property deal which could not be finalized. However the cheques in question were stated to be lost by Sh. H.N. Sharma and accused issued stop payment instructions for the same to her bank. In her reply she denied any liability towards complainant. Thereafter, complainant has filed the present complaint case with the submission that accused be summoned, tried and punished according to law.

3. In his pre-summoning evidence, complainant examined himself on affidavit Ex. CW-1/A. He reiterated the contents of complaint and placed on record, five cheques dated 08.04.2006 of Rs. 2,10,000/- each as Ex. CW-1/1 to Ex. CW-1/5, agreement dated 07.03.2006 as Ex. CW-1/6, agreement dated 30.03.2006 as Ex. CW-1/7, copy of papers of property bearing no. UGF-3, UG Floor, Mohta Building 4, Bhikaji Cama Place, New Delhi - 66 as Ex. CW-1/7A, original cheques in question bearing no. 824518, 824520 and 824519 dated 15.01.2010, 15.02.2010 and 31.01.2010 respectively, all drawn on Central Bank of India, Gulmohar Park, Delhi as Ex. CW-1/7B, Ex. CW-1/8 and Ex. CW-1/9 respectively, cheque returning memos dated 09.06.2010, 16.06.2010 and 11.06.2010 as Ex. CW-1/10, Ex. CW-1/11 and Ex. CW-1/12 respectively, legal demand notice dated 30.06.2010 as Ex. CW-1/15, receipts of speed post and courier as Ex. CW-1/13 and Ex. CW-1/14, reply dated 13.07.2010 to the legal notice as Ex. CW-1/16.

4. Upon appreciation of pre-summoning evidence, accused was summoned for an offence punishable under Section 138 of the Act and notice under Section 251 Cr.P.C. for this offence was framed upon accused on 10.08.2011 to which she pleaded not guilty and claimed trial. She stated that cheques in question were given as blank signed cheques to Sh. H.N. Sharma and matter had already been settled with him upon payment and compromise. She denied issuance of cheques to complainant or having any liability against him.

5. The accused moved an application to cross-examine the complainant. Complainant as CW-1 was duly cross examined by the accused. One Sh. Vijay Kumar Sharma (CW-2) was examined as witness to the agreements dated 07.03.2006 and 30.03.2006. He was also cross examined by accused. No other Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 3 of 12 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 reiterated the stand taken in reply in legal notice under section 138 of the Act and the notice under section 251 Cr.P.C. She stated that she had taken loan of Rs. 10,50,000/- from Sh. H.N. Sharma and given him blank signed stamp papers and property papers of her property bearing no. UGF-3, UG Floor, Mohta Building 4, Bhikaji Cama Place, New Delhi. She had repaid money to H.N. Sharma on 30.11.2007.

6. Accused preferred to lead evidence in her defence and had examined her husband Sh. Kul Rattan Bhasin as DW-1. The witness was cross-examined by counsel for complainant. The accused did not examine any other witness and vide her statement, defence evidence was closed.

7. 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 testimony of complainant, CW-2 and the agreements dated 07.03.2006 and 30.03.2006. It was argued that accused did not deny her signatures on the cheques in her plea of defence recorded at the time of framing of notice under Section 251 Cr.P.C and admitted the same in her statement U/s 313 Cr.P.C. He also argued that as per version of accused, she had taken loan from H.N. Sharma and given blank signed stamp papers for the same and blank signed cheques for a property deal. However said H.N. Sharma was never examined as a witness by the accused. He also argued that accused never filed a complaint against the complainant or H.N. Sharma for alleged misuse of stamp papers and cheques in question. 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.

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8. Per contra, Ld. Counsel for accused, argued that accused never took any loan from the complainant. He reiterated the submissions made by accused in her plea of defence at the time of framing of notice under Section 251 Cr.P.C and in her statement under Section 313 Cr.P.C. as enumerated hereinabove and that the cheques in question were misused by 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 has failed to prove his case beyond reasonable doubt and accused is entitled to be acquitted of offence u/s 138 of the Act. He relied upon Balbir Singh V. Raj Krishan 2015(3) JCC 161, Supply House v. Ullas & Anr. 2006(3) KLT 921, K. Kumar v. WS Bapsons Footwear 1994 MLJ (Crl.) 1, Sudhir Kumar Bhalla v. Jagdish Chand (2008) 7 SCC 137 and Laxminiwas v. Andhra Semi Conductors Pvt. Ltd. 2006 Crl. LJ 2648 (All)

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

10. 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 Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 5 of 12 receipt of aforesaid legal notice of demand.

11. 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, 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".

12. 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].

13. In the present case, accused did not deny her signatures on the cheques in her plea of defence recorded at the time of framing of notice under Section 251 Cr.P.C and also admitted the same in her statement U/s 313 Cr.P.C.. Reference Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 6 of 12 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 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.

14. In the present case, the principle defence taken by the accused is that she did not even know the complainant and had not taken any loan from him. The sole witness on behalf of accused, DW-1, i.e. husband of accused deposed in his examination-in-chief that the agreements Ex. CW-1/6 and Ex. CW-1/7, were given as blank signed stamp papers along with property papers of UGF-3, UG Floor, Mohta Building 4, Bhikaji Cama Place, New Delhi to H. N. Sharma at the time of taking loan of Rs. 10,50,000/- from him on 07.03.2006 in presence of one Manish Kumar. He also deposed that this loan taken from H.N. Sharma was repaid to him in full on 30.11.2007, in presence of Manish Kumar, however he did not remember Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 7 of 12 whether the documents were returned to them or Manish Kumar. Consequently the accused also lodged complainant in P.S. Gulmohar Park for the missing documents Ex. DW-1/A on which an NCR was registered Ex. DW-1/B.

15. However, this testimony of DW-1 does not inspire confidence, as in his cross-examination, he admitted that he did not place on record any document regarding repayment of Rs. 10,50,000/- to H.N. Sharma, as no receipt was asked for or given. It does not appear plausible that a person taking loan of an amount of Rs. 10,50,000/- against his property documents and blank signed stamp papers would not even take any acknowledgment upon repayment of the loan. Furthermore even in his examination-in-chief, DW-1 stated that he did not remember whether the documents were returned to them or to Manish Kumar. Also admittedly, in police complainant Ex. DW-1/A and NCR Ex. DW-1/B, there was no averment that the documents were returned to accused or her husband by H.N. Sharma. In the police complaint and the NCR there is no mention of any blank signed stamp papers being returned or missing. The witness also failed to explain why they did not go back to house of H.N. Sharma to enquire whether documents have been left there or not. The same is contrary to ordinary human conduct. Moreover the accused did not examine Manish Kumar as a witness, who is stated to be present at the time of grant of loan and at time of repayment and return of documents. Also the accused did not deny her signatures on agreements Ex. CW-1/6 and Ex. CW-1/7 throughout trial. DW-1, also stated in his testimony that Ex. CW-1/7 and first page of Ex. CW-1/6 are signed by accused. The accused did not lead any evidence to show that her signatures had been obtained on blank stamp papers or the same have been misused. Admittedly she did not file any complaint against complainant or H.N. Sharma for misuse of documents. Hence this version put forth by the accused regarding lost documents being misused is not reliable.

16. Regarding the cheques in question, the explanation given by DW-1 in his examination-in-chief is that they were signed by accused and bore the amount of Rs. 1.00 lakh each, when they were given to Sh. H.N. Sharma for a property deal Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 8 of 12 in January 2010. DW-1 also stated that the remaining particulars were not filled by them. He also deposed that in February 2010, H.N. Sharma approached him and his wife i.e. accused, and told them that cheques in question were lost and requested them to stop payment of the cheques. He also deposed that at request of H.N. Sharma, they gave four fresh cheques to him which were also misused by him in collusion with one Narender Singh of Bangalore who issued notice for dishonor of those cheques to them. He thus deposed that cheques in question have been misused by complainant in collusion with H.N. Sharma.

17. As far as the explanation that cheques in question were given for a property deal to H.N. Sharma in January 2010, the same also does not inspire confidence as DW-1 does not even mention or specify the description or place of the property for which deal was to be made. Furthermore, as per version of accused, in 2007 itself, the property papers of accused for property bearing no. UGF-3, UG Floor, Mohta Building 4, Bhikaji Cama Place, New Delhi were lost/went missing at instance of H.N. Sharma for which police complaint was also filed. In these facts and circumstances, there is no explanation as to what occasioned the accused to again repose trust in H.N. Sharma and give blank signed cheques with only the amount filled in to him in 2010. The same is contrary to ordinary human conduct and this version of accused does not seem credible. Merely because the accused issued stop payment instructions for two of the cheques in question, which have been dishonored for said reason, does not establish that the accused did not have liability against the cheques in question. Moreover the accused did not lead any evidence to show as to when the stop payment instructions for cheques in question were issued.

18. Even otherwise, if for the sake of argument, it is considered that the accused gave signed cheques after filling in the amount, without writing name of the payee, once accused has admitted her signatures on the cheques she cannot escape his liability on the ground that some of the particulars have not been filled in by her, or that signatures on cheque and the contents are filled in different writings and inks. When such a cheque containing blanks is signed and handed Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 9 of 12 over, it means that the person signing it has given implied authority to the holder of the cheque, to fill up the blank which he has left. It has been clearly laid down in Section 20 of Negotiable Instruments Act 1881, that where one person signs and delivers to another a Negotiable Instrument 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 maybe, upon it a negotiable instrument". In the case of Satish Jayantilal Shah v. Pankaj Mashruwala and Anr. 1996 Cri. L. J. 3099, it has been held that:

"no law provides that in case of any negotiable instruments entire body has to be written by maker or drawer only."

In the case of Moideen v. Johny 2006 (2) DCR 421, it has been held that when a blank cheque is issued, the drawer gives an authority to the person to whom it is issued, to fill it up at the appropriate stage with necessary entries and to present it to the bank. Thus, the accused can not dispute the contents of the cheque in question.

19. Ld. Counsel for accused also argued that in cross examination of CW-1 i.e. complainant, he stated that he knew the accused since year 2010 and he also stated that he handed over the money to accused in first week of March 2010. He argued that same is a material contradiction as case of complainant has been that he gave loan to accused in March 2006. However this argument of Ld. Counsel for accused is not tenable as the date of agreement vide which loan was advanced is clearly specified as 07.03.2006 in written agreements Ex. CW-1/6 and Ex. CW-1/7. The accused has not denied her signatures on both the said documents. It also cannot be lost sight of that the complainant was cross- examined in year 2016, whereas the present complaint was filed in year 2010 and the agreements were executed long back in year 2006. Hence the inconsistency is possible

due to lapse of memory of the witness and not substantial. Moreover, in his cross-examination, complainant was never confronted with his evidence affidavit or the agreements Ex. CW-1/6 or Ex. CW-1/7 to contradict him on the aspect of date of loan. Also the witness to said agreements i.e. CW-2 Vijay Kumar Sharma stated in his testimony that both the agreements were signed by Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 10 of 12 complainant and accused in his presence. He was cross-examined on 19.07.2017 and upon being questioned as to when he signed Ex. CW-1/6, he answered that it had been 10-11 years ago. Thus CW-2 also corroborated the version of complainant regarding the documents executed in year 2006. No suggestion was put to CW-2 in his cross-examination that the documents were not executed in 2006. Nothing could be elicited in cross-examination of CW-2 to doubt the credibility of the witness.

20. Ld. Counsel for accused also argued that the complainant in his cross- examination admitted that present loan was not shown in his Income Tax return, and the same casts doubt on case of complainant. This argument is devoid of any merit as such a mere admission is inconsequential in light of unrefuted written agreements Ex. CW-1/6 and Ex. CW-1/7 which substantiate the capacity complainant to advance loan of Rs. 10,50,000/- to accused. In his cross- examination, complainant also explained the sources of funds for present loan. Also, it is established position of law that an amount not disclosed in the income tax returns does not become irrecoverable under Section 138 of the Negotiable Instruments Act. Reliance can be placed upon the decision of Hon'ble High Court of Delhi in Lekh Raj Sharma v. Yashpal Sharma, (Crl.L.P. 567/2014), D.O.D. 30.06.2015, wherein it was observed:

".....21. The finding that, as the amount of loan disbursed to the respondent was not shown in the balance sheet and income tax return, the appellant could not be said to have proved its case beyond reasonable doubt, is also erroneous. In this regard, reference may be placed on the decisions of the Bombay High Court in:

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ii) Mr. Krishna P. Morajkar vs. Mr. Joe Ferrao, 2013 CRIJ (NOC) 572 Bombay (Decided on 19.07.2013), wherein the Court observed:

"The underlined observations do not disclose as to where can one find a prohibition on recovering amounts not disclosed in income tax returns. With utmost humility, I have to state that I have not come across any provision of Income Tax Act, which makes an amount not shown in the income tax returns unrecoverable. The entire scheme of the Income Tax Act is for ensuring that all amounts are accounted for. If some amounts are not accounted for, the person would be visited with Sachin Bahmba Vs. Amrita Bhasin CC No. 4993570/16 Page no. 11 of 12 the penalty or at times even prosecution under the Income Tax Act, but it does not mean that the borrower can refuse to pay the amount which he has borrowed simply, because there is some infraction of the provisions of the Income Tax Act. Infraction of provisions of Income Tax Act would be a matter between the revenue and the defaulter and advantage thereof cannot be taken by the borrower. In my humble view, to say that

an amount not disclosed in the income tax returns becomes irrecoverable would itself defeat the provisions of Section 138 of the Negotiable Instruments Act."

21. The judgments relied upon by the parties, reiterate the established principles of law already discussed or are distinguishable on facts and proposition of law laid down therein and hence, are not applicable to the case at hand. 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 cheques in question, return memos, legal notice and other documents 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.

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

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

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

MRIDUL

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MRIDUL

GUPTA

Date: 2
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ANNOUNCED IN THE OPEN COURT
TODAY i.e. 29th August 2018

(MRIDUL GUPTA)
METROPOLITAN MAGISTRATE
DWARKA DISTRICT COURTS/ DELHI

Sachin Bahmba Vs. Amrita Bhasin

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