

Complainant vs . on 20 December, 2019

IN THE COURT OF Ms. PREETI AGARWALA, MM-03
(NEGOTIABLE INSTRUMENTS ACT) EAST DISTRICT,
KARKARDOOMA COURTS, DELHI

Smt. Sunita Babbar
W/o Sh. Ravi Babbar
R/o 7/52, Park side, Geeta Colony,
Delhi - 110 031

..... Complainant

Vs.

Sh. Kuldeep Kumar Sharma
S/o Sh. J.K. Sharma
R/o 13/180, Geeta Colony,
Delhi - 110 031.

..... Accused

JUDGMENT

Complainant Case No.	: 54800/2016
Date of institution :	: 08.05.2015
Offence alleged	: Under Section 138 NI Act
Plea of the accused	: Not pleaded guilty
Final order	: Conviction
Date of Decision	: 20.12.2019

Brief Reasons of the case:-

The facts in brief that prodded the complainant to file the present case is that the accused was known to the complainant from last several years and therefore, he approached the complainant for a friendly loan of Rs. 1,50,000/- on 03.12.2014. The complainant being on good terms with the accused, advanced the said amount for a stipulated period of 43 days. The accused in discharge of his liability, issued the cheque in question bearing no. 872352 dated 18.03.2015 amounting Rs. 1,50,000/-. The complainant presented the cheque in question for encashment through her banker but the same got dishonoured by the bankers of accused with the remarks "Funds Insufficient" vide returning memo dated 20.03.2015. Henceforth, the complainant issued the mandatory notice U/s 138 NI Act and the same was served upon the accused vide postal receipts and registered AD.

2. After the institution of the present complaint, the complainant adduced her pre summoning evidence U/s 200 Cr. P.C. on the basis of which, the accused was summoned to face trial for the offence U/s 138 NI Act. After the service of the summons, the accused entered his appearance whereupon the provisions of Sec. 207 Cr. P.C. were also complied.

3. The accused was admitted to bail and then notice U/s 251 Cr. P.C. for the offence U/s 138 NI Act

was served upon the accused after hearing the contesting parties. Needless to say, the accused pleaded "Not Guilty" and claimed trial.

4. In order to substantiate her case, the complainant examined himself as CW1 whose contents are a mere repetition of what had already been discussed under the "Brief Facts" and hence are not repeated for the sake of brevity. Complainant was cross-examined and thereafter the CE was closed.

5. All the incriminating circumstances, appearing in the evidence against the accused were put to him in order to enable him to Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma ☐☐offer his explanation under Section 313 r/w sec 281 Cr. PC. Thereafter, the accused lead his defence evidence and examined himself as DW☐, Jai Kishan Bagga as DW2 and ASI Duli Chand as DW3, after which the defence evidence was closed and final arguments were heard.

6. I have carefully gone through the entire file and have heard the arguments on both sides.

7. In an offence under Section 138 N.I. Act, all the complainant is required to prove is execution of cheque in favour of the complainant for an existing legal liability, the dishonour of cheque and the failure to comply with the requirements of legal notice within the statutory period of 15 days. Once, this burden is discharged all the accused is required to do is only to raise a doubt in the story of the complainant on the scale of preponderance of probabilities in order to get the benefit of doubt and discharge his burden.

8. Now in the given case, the complainant has already furnished all the documents regarding the issuance of cheque on record . Once, that is proved the presumptions u/s 118 NI Act and 139 NI Act would get attracted as held by Hon'ble Apex Court in "Rangappa Vs. Sri Mohan" SLP (Crl.) 407/06, wherein it was held:

"it will be presumed in favour of the complainant during the trial that the cheque in question was received by the complainant against a legally enforceable debt or liability".

Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma ☐☐Once the presumption is raised the onus squarely shifts on the accused to rebut the same failing which the court "shall" presume that the cheque in question was issued towards some legal debt or liability and in lieu of consideration. It is for the accused now to put forth his defence.

9. The accused per contra has denied the allegations made by the complainant. However, the accused has quite unequivocally admitted that he has issued the cheque in question to the complainant. He has also admitted his signature on the cheque but has denied that he has filled the other particulars of the cheque. Once, it is so admitted that the cheque in question was issued by the complainant under her signature, the enquiry gets circumscribed to the question whether the defence led by the accused is credible. The case of the accused as alleged in his statement u/s. 251 Cr.PC is that the cheque was issued as blank signed for the purpose of security. The same were handed over to Mr. Shyam Sunder and it had absolutely nothing to do with the complainant. Now,

interestingly, in his statement u/s. 313 r/w Section 281 Cr.PC, the accused has contradicted himself and stated that the cheque in question was handed over to the complainant again only for security purpose. Interestingly, the accused failed to explain as to why he did not file any police complaint or make any other effort to retrieve the security cheque from the complainant or Mr. Shyam Sunder. The defence of issuing blank signed cheque to the complainant also does not hold water as it is already explicitly laid down in Section 20 of NI Act, Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma [5][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 may be, upon it a negotiable instrument". It has also been held by Hon'ble High Court of Delhi in "Jaipal Singh Rana Vs. Swaraj Pal, (149(2008) DLT882):[6]"There is no alteration in a cheque if the amount and the date are filled by somebody else part from the signatory of the cheque".

It was further held that:[7]"There is no law that requires the filling up of entire cheque by drawer himself".

Further in Ravi Chopra Vs. State & Anr (2008(2) LRC118(Del), it has been held that:[8]"If a blank signed cheque is given then it is possible that the drawer has consented impliedly or expressly to filling up of the cheque by the payee on a later date".

Also, in Vijender Singh Vs. Eicher Mobros Ltd & Anr, it was held by Hon'ble High Court on 05.05.2011, that any person who issues blank signed cheque should understand the consequences of doing so.

10. The pivotal defence raised by the accused is that he does not have any legally, enforceable liability towards the complainant and the cheque in question has been misused by the complainant. If that indeed was the case, then, one fails to understand as to why the accused Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma [6][never instructed his bank to stop payment or for that matter, why has he not registered any police complaint regarding the misuse of the same. The accused did not lead any proof to show that the cheque in question was indeed given as security cheque.

11. The clinching piece of evidence that defeats the entire case of accused is in the defence raised by him at various places which are not only inconsistent, but also contradictory. While in his statement u/s. 251 Cr.PC., the accused has alleged that he had issued the cheque in question to Mr. Shyam Sunder as he had purchased one property from him and that he has no relation with the complainant and he had never taken any loan from the complainant, on the other hand, in his statement u/s. 313 r/w Section 281 Cr.PC, accused had taken completely inconsistent defence and in contradiction to above, he alleged that he knew the complainant as he had purchased a property in January 2014 and the complainant had purchased 10% share in that property from him, on account of which, the security cheque was given to the complainant despite the fact that the deal was never finalized. Further, upon repeated insistence from the complainant, he has also paid Rs. 7,00,000/[9] as full and final payment. The accused has taken completely contradictory and opposite defence, thereby rendering his case completely doubtful.

12. Again, in his statement u/s. 251 Cr.PC., the accused alleged that he never received the legal demand notice, whereas, u/s. 313 Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma [7]r/w Section 281 Cr.PC, he had admitted that he had received the legal demand notice. Otherwise also, it is inconsequential in the given circumstances as it has already been held by Hon'ble Apex court in C.C. Alavi Haji V. Palapetty Muhammad & anr. (2007)6 SCC 555 and as correctly relied upon by the complainant, to quote "It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the Court in respect of the complaint under section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court alongwith the copy of the complaint under section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation."

13. Even though, the accused has taken completely contradictory defence in his statement u/s. 313 Cr.PC from what he had Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma [8]alleged at the time of framing of notice, it is alleged that the money was paid in the presence of Mr. Shyam Sunder at one place and at another place, it is alleged that the cheque in question was issued to Mr. Shyam Sunder himself and not the complainant. That being so, it was pertinent to examine the said witness Shyam Sunder to corroborate and prove the case of the accused. The accused made no effort to examine the above witness who was pivotal to prove his case.

14. Accused examined himself as DW1 and even his deposition is hardly helpful to prove his case as he too has raised vague allegations and has contradicted himself. He has alleged in his examination in chief that there was a transaction with the complainant pertaining to purchase of one property and in lieu of the same, an agreement to sell Ex. CW1/D[2] was executed between him and the complainant on 31.01.2014 and the complainant had also advanced him a loan of Rs. 6,80,000[Thereafter, as the deal was cancelled, he has paid back Rs. 7,00,000[to the complainant. The above agreement has never been disputed by the complainant and it is already admitted by him that there was a previous transaction, but his case pertaining to the cheque in question has no relation with the above previous deal. The accused has failed to furnish on record any oral or documentary evidence to prove that the cheque in question was actually advanced in relation to above transaction. In his cross[examination dated 30.08.2018, the accused further contradicted himself and submitted for the first time that he has paid Rs. 7,50,000[to the complainant in cash in Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma [9]one go. He has further alleged that he made no objection to the payment of the above amount instead of Rs. 7,00,000[as the complainant was harassing him and threatening him alongwith other property dealers namely Shyam Sunder and Jai Kishan Bagga and he also used to repeatedly dial 100 number against him and above two persons. The accused could not explain the above allegations and he himself admitted that he did

not lodge any complaint regarding the above harassment or threat being extended by the complainant. He further failed to reveal any details regarding the payment of Rs. 7,50,000 to the complainant as alleged by him. The above defence in the absence of any evidence false flat. The accused has also examined his friend Jai Kishan Bagga as DW2 to prove the above contention. Though, he too tried to depose in similar lines as the accused in order to support his case, unfortunately, he too contradicted the accused by averring that the accused has paid Rs. 7,00,000 to the complainant. His deposition is completely silent regarding the payment of Rs. 7,50,000 to the complainant as alleged by the accused. His credibility was further impeached by Ld. Counsel for complainant when he admitted that he had appeared before the Court to depose only at the instance of the accused. He also identified the signature of accused in the loan agreement and made several inconsistent defence which is nowhere corroborated by the defences raised by the accused. For the first time in his cross examination, he alleged that Rs. 7,00,000 was paid to the complainant in two installments and further admitted that he did not remember the amount of each installment. He further alleged that there was some dispute Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma regarding Rs. 1.5 lac. which was subsequently settled with his help. This further raises doubt in the story of the accused as the above dispute was never alleged to by the accused ever during the course of this trial. The above witness being completely impeached is also unreliable.

15. The accused has also gone on to vehemently argue that the complainant has not shown the loan transaction in her income tax return. The accused has also relied upon a Judgment of Hon'ble Supreme Court of India Krishna Janardhan Bhat Vs. Dattatraya G. Hegde (Criminal Appeal No. 518 of 2006 dated 11.01.2008) and another Judgment of Hon'ble High Court of Delhi Ashok Baugh Vs. Kamal Baugh (Crl. L.P. 358 of 2012 dated 06.10.2015) to prove the above contentions. True, but again it is already a settled law now as held in "Krishna P. Murajkar Vs. Joe Ferrao"(2013 ACD 942 Bombay): "Any default in paying tax is a matter between the defaulter and revenue authorities and it is not a ground in law to deny avenues open to the complainant for recovering the loan amount".

Ergo, the defence of the Counsel for accused also does not hold water. Further, the facts of the above two Judgments are also completely distinguishable from the facts of the present case. The accused has further relied upon another Judgment of Hon'ble Supreme Court of India K. Subramani Vs. K. Damodara Naidu (Criminal Appeal No. 2402 of 2014 decided on 13.11.2014) to allege that the complainant could not show his source of income for the advancement of the loan. It is already Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma a settled law now that once the signature is admitted in the cheque in question, the presumption would raise regarding the existence of legal liability on the part of the accused. Further, the accused has himself admitted that on an earlier occasion also, Rs. 6.8 lac. was advanced to him by the complainant. The complainant herself also has admitted that she is running a part time business of property dealing from her home and that her husband is also running the business of jewellery. Therefore, the above defence also fails.

16. The most important piece of evidence revolves around the alleged loan agreement that completely clinches the case out of hands of the accused. The complainant during the course of the trial has relied upon a loan agreement which is Mark DW2/X. The above loan agreement in clear

terms spells out the alleged loan of Rs. 1,50,000 advanced to the accused and establishes the legal liability of the accused towards the complainant. The accused has also admitted the signature in the above loan agreement that further underlines the veracity of the case of the complainant. The defence and the explanation to the above loan agreement raised by the accused is merely that it was forged and fabricated by the complainant. The said loan agreement was never executed by the accused and that the complainant has stolen the blank signed stamp papers lying in the office of Shyam Sunder and which was subsequently converted by the complainant in to the alleged loan agreement. The above defence is completely devoid of any merits. No evidence was led by the accused to prove the above defence. The Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma ¹² accused merely argued that the loan agreement was filed subsequently by the complainant during the course of the trial, but he failed to explain his signature in the said loan agreement, which has been duly admitted by him. The mere defence that blank signed papers were stolen from the office of Shyam Sunder did not stand the test of trial as the complainant merely relied upon a police complaint Ex. DW3/2 to show that he had filed a missing complaint regarding the stolen blank signed papers. However, the above complaint is also of little help to the accused as the above complaint dated 27.07.2017 has been filed not only after the filing of the present case, but interestingly, also only after the complainant has filed the loan agreement on record i.e. on 20.07.2017. It clearly proves that the above police complaint is merely an after thought.

17. Reading of the evidence on record in its entirety, would show that firstly, the evidence is not supportive with the innocence of the accused and rather renders the story of the complainant more credible. Secondly, accused has not produced any cogent proof in support of her defence on record. It was clearly held in Hiten P. Dalal V. Bratindranath Banerjee(2001 SCC CRL960) that a mere plausible explanation given by the accused is not enough. The accused has to necessarily prove in the trial, by leading cogent evidence that there was no debt or liability.

18. This court is of the opinion that the defence set up is neither definitive nor consistent with innocence of the accused. It is the burden of the accused to bring positive evidence, in the wake of denying Complaint Case No. 54800/2016 Sunita Babbar Vs. Kuldeep Kumar Sharma ¹³ the liability by bringing evidence showing that accused has no liability towards complainant in the present complaint. It was the sole burden and duty of the accused to prove no liability by raising a "probable" defence. The accused has failed to discharge her onus.

19. For rebutting the presumptions under the 'Act', a just need is to raise a probable defence. However, in the present case accused has not only failed to show a preponderance of probability in her favour but has also failed in discharging her initial burden for rebutting the presumption under the NI Act by not leading any cogent evidence in her support. Thus, the court unhesitatingly holds that the accused has not been able to rebut the presumptions under section 139 and 118 NI Act standing in favour of the complainant.

20. Having considered the entire evidence, the court is of the opinion that the complainant has successfully proved all the essential ingredients of Section 138 of the Act. Accordingly, accused is held guilty for committing the offence punishable u/s 138 of the Act. He is hereby, convicted for the

offence under section 138 of the Act. Let he be heard on the point of sentence separately. by PREETI
PREETI AGARWALA Announced in the open Court on 20.12.2019. AGARWALA Date:

2019.12.20 16:25:04 +0530 Preeti Agarwala Metropolitan Magistrate 03 (East),
Karkardooma Courts, Delhi Complaint Case No. 54800/2016 Sunita Babbar Vs.
Kuldeep Kumar Sharma