M/S Naini Fincap Limited vs . on 27 October, 2021

IN THE COURT OF MS. CHARAN SALWAN METROPOLITAN MAGISTRATE NI ACT-02,
WEST DISTRICT, TIS HAZARI COURTS, DELHI

CC No.: 1108-17
CNR NO.: DLWT02-002415/17
U/s 138 NI Act

In the matter of:

M/S Naini Fincap Limited
Registered Office At:
A-3/316, Paschim Vihar,
New Delhi - 110063 ......Complainant

Vs.

Mrs. Kavita Devi
W/o Sh. Ajit Singh,
R/o- D-217, Gauri Shanker Enclave - 1
(Near J.K. Builders)
Prem Nagar - 3,
New Delhi-110086 ..... Accused

DATE OF INSTITUTION	:	20.02.2017
OFFENCE COMPLAINED OF	:	S.138 NI Act
PLEA OF THE ACCUSED	:	PLEADED NOT GUILTY
DATE WHEN JUDGMENT RESERVED	:	27.10.2021
DATE OF JUDGMENT	:	27.10.2021
DECISION	:	CONVICTED

BRIEF STATEMENT OF FACTS FOR THE DECISION: -

1.

Vide this judgment, I shall decide the present complaint filed by the complainant Naini Fincap Ltd., a finance company through its authorised representative Sh. Yogesh Yadav, vide board resolution dated 19.11.2012 (Ex CW-1/1) u/s 138 Negotiable Instrument Act against the accused Mrs. Kavita Devi W/o Sh. Ajit Singh.

Factual Matrix:

2. Briefly put, the case of the complainant as narrated in the complaint is that the accused approached the complainant company to take a Hero Splendor Motorcycle (hereinafter called the said vehicle) on Hire Purchase Basis. For the purpose of establishing identity/credentials/ credit worthiness, the accused furnished certain documents with the complainant company which were believed by the complainant company as genuine and thereafter the complainant company entered into an Agreement, Agreement No. H4636 dated 14.07.2014 (Ex CW-1/3) in respect of the said vehicle. As per the agreement, the Hirer agreed that in the event of default, the Hirer shall be liable to pay the balance of installments together with other dues and charges and shall also be liable to pay penal charges, overdue charge as well as interest, fees, commitment charges on the outstanding amount till the date of receipt of payment to the company. Thereafter, the accused took and enjoyed the possession of the said vehicle, but she failed to adhere to the financial discipline of payment of installments. The accused irregularly paid a few installments. As per the statement of account of the company (Ex. CW-1/5), an amount of Rs. 28,538/- was outstanding as on 15.12.2016. On follow up by the company, the accused in discharge of her legal liability issued a cheque bearing no.766956 dated 21.12.2016 drawn on State Bank of India, Brach Mundka, Delhi for a sum of Rs. 28,000/- (Ex. CW-1/6) (hereafter referred to as cheque in question). When presented for encashment, the cheque in question, got dishonored with the remarks "Insufficient funds" vide returning memo dated 26.12.2016 (Ex CW-1/7). This constrained the complainant to send a legal demand notice dated 02.01.2017 (Ex CW-1/8) to the accused vide postal receipt dated 06.01.2016 (Ex. CW-1/9) and tracking report (Ex. CW-1/10). The accused did not pay any heed to the said legal notice and as a result, the present complaint was filed by the complainant.

3. Pre-summoning evidence was led, cognizance of the offence u/s 138 NI Act was taken against the accused vide order dated 04.03.2017 and thereafter, summons were issued against the accused. The accused entered into appearance, copy of complaint as well as of documents were supplied to the accused.

4. Subsequent to that notice u/s 251 Cr.P.C for offence u/s 138 N.I. Act was served upon the accused to which the accused pleaded "not guilty" and claimed trial. In her plea of defence, recorded on 17.07.2019 accused admitted her signatures on cheque in question. She stated that she did not fill the other particulars on the cheque. The accused admitted of having received the legal demand notice and admitted that it bears her correct address. She admitted that she took a loan for the finance of motorcycle from the complainant. The defence of the accused was that the cheque in question was a security cheque. She stated that she has repaid the entire amount and that the complainant is misusing her cheque. She denied any liability towards the complainant. Thus, complainant led evidence to prove its case.

Evidence of the complainant

5. Complainant examined its AR, Sh. Yogesh Yadav as CW-1. He reiterated the facts of the complaint in his evidence affidavit (Ex. CW1/A). He relied upon documents Ex.CW1/1 to Ex.CW1/10). He was duly cross-examined by the Ld. Counsel for the accused.

6. In his cross- examination, the AR stated that he was authorised by the company for the present case in the year 2011. He stated that he does not remember the exact date of sanctioning of the loan. He stated that he does not remember the exact amount of the loan, but it was around Rs. 37,000/-. He stated that he does not remember the registration number of the vehicle, but the make of the said vehicle is Hero. He admitted that registration number of the vehicle is not mentioned in the complaint or the legal notice. He admitted that the engine number and chasis number are not mentioned in the complaint and his evidence affidavit. He stated that the same are mentioned in the Agreement at page No. 4. He admitted that the loan was neither notarized nor registered at the time of execution of the same. The AR stated that the payment of loan amount was made on the name of dealer M/S Shiv Ganga Automobiles. He admitted that the said fact was not mentioned in the legal notice and the complaint. He stated that the company is authorised by the Reserve Bank of India to finance the vehicles. He admitted that no request was made to the accused to repay the loan apart from the legal demand notice. He admitted that there is no stamp of 'accepted' on the proposal form (Ex CW-1/2). He admitted that there is no stamp of the company of the loan agreement on the first three pages, however he stated that there is a stamp on the last page. He stated that the signature on the loan agreement is of Mr. Hari Ram Garg, who is the MD of the complainant. He denied the suggestion that the vehicle was financed by Sharma Automobiles.

Defence of the Accused

7. The version of facts discernible from the cross-examination of the complainant, defence of the accused u/s 251 Cr.P.C and the defence evidence of the accused is that the accused does not owe liability qua the cheque in question and that the cheque in question was given as a security to the complainant. The accused also states that the cheque was misused by the complainant against the accused.

8. In her defence, the accused chose to examine her husband as the sole defence witness, i.e., Sh. Ajeet Singh as DW-1.

9. In his examination -in- chief, the witness deposed that he had purchased a motorcycle from Sharma Auto Mobile about 3-4 years ago. He stated that he deposited complete instalments with Sharma Auto Mobile. He stated that the cheque in question was given as a security cheque to Sharma Auto Mobile. He stated that after payment of complete instalment amount, Sharma Auto Mobile did not return his security cheque and did not return the RC of the motorcycle purchased.

10. In the cross-examination of the witness, he denied the suggestion that the accused executed proposal of hirer/purchaser form (Ex-CW-1/2) with the complainant. He denied the suggestion that the accused entered into a loan agreement (Ex CW-1/3) with the complainant. He stated that the

motorcycle was purchased from Sharma Auto Mobile and the loan was taken by Sharma Auto Mobile. He admitted that the proposal of hirer/hypothecate form (Ex-CW-1/2) and the loan agreement (Ex.- CW- 1/3) bears the signature of his wife, i.e., the accused. He also admitted that he signed Ex. CW-1/2 and Ex. CW - 1/3 as guarantor. He further stated that he does not know if Sharma Auto Mobile only deals with motorcycles and whether it deals in finance/ give loans on motorcycles. He stated that he does not if the loan executive sits in the office of Sharma Auto Mobile. He admitted that Ex. CW-1/2 and Ex. CW-1/3 were executed in the office of Sharma Auto Mobile. He stated that he has paid all the instalments in cash to a person in the office of Sharma Auto mobile. He stated that no receipt was issued for deposit of instalments.

11. The factual position being thus, the legal benchmark which is to be satisfied in order to constitute an offence u/s 138 N. I. Act is:

> a) That the accused issued a cheque in favour of the payee/complainant on an account maintained by him to discharge legal liability in whole or in part.
>
> (b) That the cheque was presented within stipulated time by the complainant for encashment.
>
> (c) That the cheque was dishonoured on presentation because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank.
>
> (d) That the demand for the payment of the said amount of money is made by giving a legal demand notice within 30 days from the receipt of information from the bank regarding the return of the cheque as unpaid.
>
> (e) That the accused fails to make payment of the cheque amount to the complainant within 15 days, after receiving of the legal demand notice.

12. Being cumulative, a person who has drawn the cheque is deemed to have committed an offence u/s 138 N. I. Act when all the above -mentioned ingredients are satisfied.

13. The Ld. Counsel for the complainant and the Ld. Counsel for accused have argued the matter at length. I have perused the submissions of both the parties and have gone through the judicial file.

14. On analysis of the facts and legal positions stated above, the court finds the parties to be at variance on only one of the primary issues i.e., whether the cheque in question was issued in favour of the complainant in order to discharge the legal liability of the accused to pay the amount of Rs.28,000/-

Existence of legally enforceable debt or liability

15. It has been admitted by the accused that the cheque in question was drawn by her upon the bank account maintained in her name and having signed the same. Once these foundational facts are admitted and a factual base is established, presumption of cheque having been issued in discharge of legally recoverable debt and drawn for lawful consideration arises by virtue of Section 118 (a) and Section 139 of N. I. Act.

Section 118 (a) of the Act provides that until the contrary is proved, it shall be presumed that "that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

Further, Section 139 of the Act lays down that "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."

For appreciating the legal position, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of Hiten P.Dalal v/s Bratindranath Banerjee (2001) 6 SCC 16 where in it was held that :

> "22. Because both sections 138 and 139 require that the court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A Vaidyanatha Iyer AIR 1958 SC 61, it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rule of evidence and do no conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact."

Therefore, it is a mandatory presumption though the accused is entitled to rebut the said presumption. In a catena of judgements, it has been laid down by the Hon'ble Supreme Court that such presumption in favour of the complainant cannot be rebutted by a mere plausible explanation, but more than a plausible explanation is required.

16. In Rangappa Vs Sri Mohan (2010)11 SCC 441, it was observed that Section 139 of N.I. Act is stated to be an example of a reverse onus clause which is in tune with the legislator intent of improving the credibility of negotiable instruments. Section 138 of N. I. Act provides for speedy remedy in a criminal forum, in relation to dishonour of cheques.

17. In case of Kumar Exports vs. Sharma Carpets, (2009) 2 SCC 513, the Hon'ble Supreme Court has held: -

> The accused under Section 138 NI Act has two options. He can either show that the consideration and debt did not exit or that under the particular circumstances of the case, the nonexistence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumption, an accused is not expected to prove his defence beyond reasonable doubt as it is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the nonexistence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their nonexistence was so probably that a prudent man under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question, was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon the circumstantial evidence and if the circumstances so relied upon are so compelling, the burden may likewise shift again on the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arises under Section 118 and 139 of NI Act".

18. According to the scheme of N. I. Act, on proof of foundational facts, a presumption arises as to the cheques having been issued in discharge of the legal liability and the burden is on the accused to rebut the said presumption. This clearly is an instance of the rule of "reverse onus" in action where it is incumbent on the accused to lead what can be called as "negative evidence". The evidence of a character, not to prove a fact affirmative, but to lead evidence to show non-existence of a liability. Keeping in view, this is a departure from the cardinal rule of "presumption of innocence" in favour of the accused, keeping in mind that the negative evidence is not easy to be led by its very nature. It is now clearly settled that the accused can reverse this presumption on a scale of preponderance of probabilities. Lack of legally enforceable debt in favour of the complainant need not be proved to the hilt beyond all reasonable doubts. Preponderance is superiority in weight. Preponderance of probabilities means more probable than not and superior in evidentiary weight than the opposite.

19. As discussed above, it is clear, that the accused need not discharge his liability beyond the shadow of reasonable doubt. The accused just needs to create holes in the case set out by the complainant. Accused can either say that the version brought forth by the complainant is inherently

unbelievable and, therefore, the prosecution cannot stand, or the accused can give his version of the story and say that on the basis of his version the story of the complainant cannot be believed. In the first situation, the accused has nothing to do but to point inherit inconsistencies in the case of the complainant.

20. So far as the facts of liability is concerned, in view of mandatory presumption of law as discussed above, if any accepted signed cheque has been produced by the complainant, there cannot be any inherent lacuna in the existence of the liability. But then definitely, accused can point loopholes in the story of the complainant by impeaching the credit of the witness during his cross-examination. The accused can discharge his burden by demonstrating the preponderance of probabilities coming in its way.

Analysis of the defence of the accused

21. The defence of the accused is that the cheque in question was not issued to the complainant. It was argued on behalf of the accused that CW-1 in his cross- examination stated that the loan amount was made in the name of the dealer i.e, M/S Shiv Ganga Automobiles. However, DW-1 in his examination in chief stated that the vehicle was purchased by Sharma Auto Mobile and the instalments were deposited with Sharma Auto Mobile. DW-1 in his cross - examination admitted that proposal of hirer/ hypothecate form which is Ex CW-1/2 and loan agreement, Ex CW-1/3 bears signature of his wife and he admitted that Ex. CW-1/2 and Ex. CW-1/3 bears his signature as guarantor. During final arguments it was argued by the complainant that Shiv Ganga Automobiles is the main dealer and Sharma Auto Mobile is under Shiv Ganga Automobile. It was further argued by the complainant that Ex. CW-1/2 mentions the name of Sharma Auto Mobiles as the seller of the said vehicle and that the name of the accused is mentioned as borrower/Hirer. It was further argued by the complainant that Ex. CW-1/3 mentions that the loan/ Finance Agreement was between the complainant and the accused. It was argued by the complainant that even during the defence u/s 251 Cr.P.C, the accused admitted that she had taken a loan for finance of motorcycle from the complainant. Therefore, after considering the arguments, the court is of the opinion that the accused has failed to prove that the cheque in question was not issued to the complainant. Also, since, DW-1 has admitted his signatures on the documents relied upon by the complainant, the liability of the accused is established.

22. The accused has also taken a defence that the cheque in question was a security cheque. The accused in her defence u/s 251 Cr.P.C has stated that the cheque in question was issued as a security cheque. Also, the DW-1 in his examination in chief stated that the cheque in question was given as a security. No details regarding the same were furnished. The accused has not brought on record any document which shows that the cheque was given as a security. The accused has merely made oral submissions of this ground. This Court places reliance on the judgment V.S. Yadav v/s Reena. CRL. A.N. 1136 of 2010, wherein, the Hon'ble High Court of Delhi has held as under:

> "Mere pleading not guilty and stating that the cheques were issued as security, would not give amount to rebutting the presumption raised u/s 139 NI Act. If mere statement u/s 313 Cr.P.C or u/s 281 Cr.P.C of accused of pleading not guilty was

> sufficient to rebut the entire evidence produced by the complainant/ prosecution, then every accused has to be acquitted. But, it is not the law. In order to rebut the presumption u/s 139 NI act, the accused, by cogent evidence has to prove the circumstance under which cheques were issued. It was for the accused to prove if no loan was taken why he did not write a letter to complainant for return of the cheque. Unless the accused had proved that he acted like a normal businessman / prudent person entering into a contract, he could not have rebutted the presumption u/s 139 NI Act. If no loan was given, but cheques were retained he immediately would have protested and asked the cheques to be returned and if still cheques were not returned, he would have served a notice as complainant. Nothing was proved in this case."

(Emphasis supplied).

Therefore, the defence of the accused that the cheque in question being a security cheque is concerned holds no ground, in the absence of any cogent evidence to prove the same.

23. The defence of the accused is that the accused did not fill the contents/particulars of the cheque in question and handed a blank security cheque. At this juncture, it would be worthwhile to discuss the provisions under section 20 of the Negotiable Instrument Act, which is as under:

> Section 20. Inchoate stamped instruments :- where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in [India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder to make or complete, as then case may be, upon a negotiable instrument, instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount, provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.
>
> Therefore, according to section 20 of the Negotiable Instrument Act, the person who signs the cheque shall be liable even if the particulars of the cheque were not filled by him/her. Therefore, the defence of the accused that she did not fill the contents/particulars of the cheque holds no ground.

24. The defence of the accused is that the accused has already repaid the amount due of the said vehicle. The accused has stated in her defence u/s 251 Cr.P.C that amount due was already paid by the accused. DW-1 in his examination in chief stated that he purchased a motorcycle from Sharma Auto Mobile about 3-4 years ago and has already deposited the complete instalments with Sharma Auto Mobile. It is pertinent to mention that nowhere the accused has mentioned that the said vehicle was financed by Sharma Auto Mobile. It has been stated that the said vehicle was purchased

by Sharma Auto Mobile. In the cross -examination of DW-1, it was stated that DW-1 was not aware if Sharma Auto Mobile deals with finance of vehicles. In her defence u/s 251, the accused stated that the motorcycle was financed by the complainant Also, the accused has not produced any cogent evidence to prove that the amount was paid. No receipt, no agreement is brought on record for proving that the amount has been paid.

Also, the accused has not brought any witness to prove the fact that loan was taken Sharma Automobile and that the entire loan amount has been repaid. Therefore, the accused has failed to prove her defence that the loan amount has been paid.

25. It has been argued on behalf of the accused that the complainant has not mentioned the vehicle, registration number, chasis number of the vehicle which was financed by the complainant. The said details were not mentioned in the complaint, affidavit and legal notice. The AR of the complainant admitted in his cross - examination that registration number, engine number, chasis number is not mentioned in the complaint, his evidence affidavit or legal notice. However, this ground alone is not sufficient for deciding the liability of the accused. The accused cannot seek acquittal only on the ground that the details of the vehicle were not mentioned in the complaint.

26. In the considered opinion of this Court, in the present complaint, the complainant has disclosed the existence of a legally enforceable debt/liability. The complainant has also proved the ingredients of Section 138 of Negotiable Instrument Act, 1881.

27. Therefore, in the opinion of this court, the accused has failed to prove her defence and in rebutting the presumption of legal liability even on the scale of preponderance of probabilities and the defence of the accused cannot be termed as a plausible defence. The presumption of legal liability u/s 118 (a) r/w Section 139 NI Act has gone un-rebutted, and the complainant has successfully proved the basic ingredients of the offence u/s 138 of the NI Act.

28. Resultantly, the accused Mrs. Kavita Devi, is held guilty and is convicted of the offence under Section 138 of the NI Act.

Let the convict be heard separately on the quantum of sentence. Copy of the judgment be given free of cost to the convict.

Pronounced in open Court on this day of 27.10.2021 (Charan Salwan) Metropolitan Magistrate (NI Act) - 02 District- West, Tis Hazari Courts, Delhi