

## **Mahesh Kumar vs Sharad Srivastava & Ors on 24 June, 2011**

IN THE COURT OF SHRI LOKESH KUMAR SHARMA : ACMM/  
NORTH EAST, KARKARDOOMA COURTS, DELHI.

MAHESH KUMAR vs SHARAD SRIVASTAVA & ORS

Date of Institution of case:10.01.2006

Date on which judgment is reserved:08.06.2011

Date on which judgment is delivered:24.06.2011

Unique I.D. No. 02402R0018332006

### **J U D G M E N T**

a) Sl. no. of the case : CC No.509/06

b) Date of commission of offence : 24.12.05 (Approx)

c) Name of complainant : Mahe  
S/o  
R/o  
Delh

d) Name of accused, her parentage : Sh. Sharad Srivastava  
Sh. D.K.Srivastava  
M/s S.S. Chemical Industries  
Both R/o 1/10864, Gali No.4,  
Subhash Park, Shahdara,  
Delhi-110032

e) Offence complained of or proved : U/S 138 N.I. Act.

f) Plea of the accused : Pleaded not guilty

g) Final order : Convicted

h) Date of such order : 24.06.2011

CC No. 509/06

j) Brief reasons for the just decision of the case:

1. Parties were stated to be on friendly terms with each other being residents of the same locality. Accused was having financial dealing with the complainant. Earlier also accused had taken loans from the complainant which were duly repaid and returned by him as well and hence he won the

confidence of the complainant and in January 2004, accused alongwith his father had approached the complainant and had asked him for a friendly loan of Rs.6,00,000/□for strengthening his business and had also promised to return the said loan within the stipulated period which was accordingly advanced to him by the complainant on 17.01.2004 in the presence of his father . Accused had assured to return an amount of Rs.3,00,000/□to the complainant within a period of 1 year and on 17.01.04 complainant had given him an amount of Rs.3,00,000/□in the presence of his father for which he had also executed a valid receipt on a stamp paper witnessed by one Sh. Manish Mittal. In discharge of his aforesaid liability he had issued three cheques bearing no. 363028, 363029 and 363030 dated 16.11.05 for Rs.1,00,000/□each drawn on Punjab National Bank, Chander Nagar, Ghaziabad, (UP) which formed subject matter of the present case. The aforesaid cheques on their presentation got dishonoured due to 'funds insufficient' vide returning memo dated 17.11.05. Thereafter, complainant CC No. 509/06 Page 2 of 23 pages sent a legal notice of demand on 05.12.05 through his counsel to the accused by courier. However, it was the case of the complainant that despite service of notice upon accused which was sent to him by courier, he had not made the payment of the cheque amount within the stipulated period of 15 days as was available to him under the law nor he had bothered to send any reply to the said notice and as such the present complaint was filed praying therein that accused be summoned, tried and punished for an offence under section 138 N. I. Act.

2. Complainant had adduced his pre□summoning evidence on record and after taking into consideration the said pre□summoning evidence, the complaint itself as well as the documents placed and proved on record by the complainant, learned predecessor of this court was pleased to take cognizance for an offence under Section 138 N. I. Act against the accused and he was summoned to face trial in this case.

3. Accused was duly served with the summons and he had also appeared to contest the case on its merits. Notice of accusation under Section 251 Cr.P.C was served upon accused on 26.04.2008 to which he had pleaded not guilty and claimed trial.

4. In order to prove his case, complainant appeared in the witness CC No. 509/06 Page 3 of 23 pages box as his sole witness and filed in evidence, his examination in chief by way of affidavit Ex. CW1/1, wherein, besides reiterating the factual contents of the complaint on solemn affirmation, complainant had also proved on record the following documents.

"Cheques forming subject matter of the present complaint are Ex. CW1/A, CW1/B & CW1/C and memo of their dishonour as Ex. CW1/E, courier receipt as Ex.CW1/E, copy of legal notice Ex. CW1/D, Receipt of Rs.3,00,000/□executed by accused on stamp paper as Ex. CW1/G & copy of legal notice on behalf of father of accused addressed to complainant as Ex. CW1/H and reply to the said legal notice Ex.CW1/K with its courier slips as Ex.CW1/E and Ex. CW1/F respectively.

5 During cross examination on behalf of accused, CW1 had deposed that he was running a dry cleaner shop in the locality and was earning Rs.50,000/□to 60,000/□per month. He was an income tax payee. In the year 2004, his monthly income was Rs.35,000/□to CC No. 509/06 Page 4

of 23 pages Rs. 45,000/- He had paid the loan in cash to the accused. His brother in law Jagdish Kumar was having a bank account. He had withdrawn Rs. 2,00,000/- from his bank and had given it to him and balance amount of Rs.4,00,000/- was paid by him out of his own sources to the accused. He had mentioned these transactions of loan in his income tax return. Accused was stated to be his friend for the last 20 years. Though Accused used to take loan from him but he had never taken any loan from accused. He had denied the suggestion put to him by learned defence counsel that no loan transaction had ever taken place between him and the accused. His further cross examination was deferred for want of income tax record on 27.02.2009.

On 03.08.2010, complainant was further cross examined by learned defence counsel. During further cross examination, he had stated that he had not brought his income tax records as same were not traceable. He had further deposed that his brother-in-law had given the money which was lying with him at his house but he had misunderstood this fact as he had seen seal of the bank on the packets of currency notes and thought that money was withdrawn by him from his bank account. He could not recollect the exact date, CC No. 509/06 Page 5 of 23 pages month, year and time when the accused had approached him for loan. Accused had taken money from him when he had started his business in the name of S.S. Chemicals at Uttar Pradesh. He had denied the fact that he had mentioned in his complaint that accused had asked him for loan on the ground of his suffering loss in business. Learned defence counsel had confronted the complainant with para 3 of his complaint wherein this fact was mentioned. He had further deposed that accused had taken an amount ranging from Rs.20,000/- to Rs.50,000/- from him on several earlier occasions but he had no writing available with him regarding money transactions with accused. He had denied the suggestion that accused had never demanded any loan from him or that he had filed a complaint on the basis of falsely cooked up story. Accused had come to his house for approaching him for loan. Documents in relation to loan transaction were perhaps prepared on 01.08.2004. Two agreements were executed in relation to loan. He had purchased stamp papers for the purpose of preparation of agreements. Both documents were executed on the same day. He did not know as to whether accused was undergoing a treatment for some psychiatric problems. He had admitted that document Ex.

CC No. 509/06 Page 6 of 23 pages CW1/D1 and D2 were also prepared by him and money involved in respect of these two documents was repaid to him by the accused. He had denied the suggestion put to him by learned defence counsel that no transaction had taken place between him and the accused and he had taken undue advantage of his psychological condition and got prepared many documents from him. Cheques were taken from the accused as security of loan. Money was advanced to the accused in several installments prior as well as subsequent to the execution of agreements firstly he had given an amount of Rs.1.5 lac to the accused. Thereafter, he had given another installment of Rs.1.5 lac and finally he had given remaining Rs.3 lacs to the accused. He had presented the cheques only after receiving notice from the accused. Accused had exceeded time limit for repayment of loan. He had denied the suggestion that no notice was ever issued or was served upon the accused. He had further denied the suggestion that no loan was advanced by him to the accused. He had further denied the suggestion that he had failed a false complaint to extort money from the accused or that agreements executed with the accused were never acted upon.

6. Thereafter CE was closed.

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7. Statement of the accused under section 313 Cr.P.C was recorded and the entire incriminating evidence appearing against him on record was put to him to which he had stated that he had been undergoing psychiatric treatment since 2002-2003. He had never entered into any financial transaction with the complainant and he had been falsely implicated in this case. He did not lead any evidence in his defence despite availing an opportunity for the same.

13. I have heard, respective learned counsels for the complainant and the accused as well as carefully gone through the written arguments filed on behalf of accused wherein preliminary objection has been taken regarding the financial capacity of the complainant to arrange such a huge amount and it has been stated that as per copy of income tax return filed on record for the relevant period only, net taxable income of the complainant has been shown to be just Rs.66,000/- per annum which negate his contention regarding having advanced such a huge amount to the accused as loan. Further, it has been stated that as per complainant's own version he had borrowed an amount of Rs.2,00,000/- from his brother in law Sh.Jagdish Kumar who was CC No. 509/06 Page 8 of 23 pages neither examined as complainant's witness in this case nor even the details of his bank account were placed on record, hence in view of the law laid down by the Hon'ble Supreme Court of India in case titled as K. Parakashan Vs. P.K. Surenderan reported in 2007 (4) RCR (Criminal) 588 when the complainant himself had no financial capacity to advance such loans and himself was in habit of borrowing money from his relatives then the acquittal of the accused was held justified by the Hon'ble Supreme Court of India. Further a plea has been taken regarding non receipt of legal notice by the accused as complainant had failed to place on record any acknowledgment card/proof of delivery in this regard on record. Reliance on this aspect has been placed on the reported judgment in case titled as M.D. Thomas vs P.S. Jaleel reported in 2009 (3) Civil Court Cases 643 (SC) wherein it has been held that notice served upon the wife of drawer was held insufficient service of notice and order of conviction was set aside on this short ground alone by Hon'ble Supreme Court of India. Further reliance has been placed by the defence counsel on case titled as Krishna Janardhan Bhat vs Duttatraya G. Hegde reported in 2008 (1) RCR (Criminal) 695 wherein it has been held that Section 139 of CC No. 509/06 Page 9 of 23 pages Negotiable Instrument Act only rests a presumption in favour of complainant/holder of the cheque that same has been issued to him for discharge of any debt or liability. However, it does not rest a presumption that debt was legally recoverable debt or not and further it has been held in the said case that it is not required on the part of the accused to prove his probable defence only by adducing some explicit evidence on record and in order to prove his innocence he may discharge his burden of rebuttal of presumptions existing against him on the basis of the material already brought on record. The accused has the constitutional right to maintain silence. Standard of proof required on the part of an accused is altogether different from that by the prosecution in a criminal case as prosecution must prove the guilt of an accused beyond all reasonable doubts. However, in case of accused, it is only merely by preponderance of probabilities which could not only be drawn from the material brought on record by the parties but also can be set up by reference to the circumstances upon which he relied.

14. It has also been stated by the accused that some papers were got prepared and the cheques were also issued by him towards CC No. 509/06 Page 10 of 23 pages security of the loan sought to be

obtained by him from/through complainant. However, no such loan was ever advanced to him by the complainant and hence the cheques given as security were without consideration. It has also been stated that despite claiming to have advanced the loans in installments to the accused ranging from Rs.20,000/- to Rs. 50,000/- complainant had failed to mention any specific dates of such advancements nor he had been able to produce any books of accounts or any other documents to substantiate his contention.

15. It has also been submitted by learned defence counsel that initially the complainant had mentioned about the execution of only two agreements but later on he had also admitted the execution of documents Ex. CW1/D1 & D2 which were put to him during his cross examination and hence, the complainant has belied his own story for which the complaint is liable to be dismissed and the accused is entitled for an order of acquittal from this court and lastly it has been submitted that the copy of judgment dated 18.10.2006 passed by Sh.Sanjeev Kumar Malhotra, the then learned MM, Karkardooma Courts, Delhi in complaint case no. 111/04 pertaining to jurisdiction of PS Bhajan Pura CC No. 509/06 Page 11 of 23 pages whereby the present accused was convicted and held guilty for an offence under Section 138 Negotiable Instrument Act and had also been relied upon by the complainant had ultimately resulted in an acquittal from the court of Sh.Talwant Singh, the then learned ASJ, Karkardooma Courts, Delhi vide orders dated 28.04.2007. However, it shall be pertinent to point out here itself that during the course of oral arguments, it was fairly conceded by learned defence counsel Sh.N.K. Singh Bhadoriya that acquittal before the court of learned ASJ was an offshoot of the compromise and settlement arrived between the parties to the aforesaid case before the learned appellate court and not due to any sudden and drastic changes in the facts and circumstances of this case.

16. On the other hand, learned defence counsel appearing for the complainant had submitted that case of the complainant is crystal clear and has been proved against the accused beyond all reasonable doubts and defence of accused himself is shaky in nature.

17.As, on the one hand, accused is challenging the financial capacity of the complainant to advance any loan to such a huge extent of Rs.6,00,000/- and on the other hand he is trying to take up the CC No. 509/06 Page 12 of 23 pages shelter of the pleas that the cheques in question were though issued by him but were issued towards security for the loan which he purportedly wanted to obtain from the complainant and lastly the accused had tried to take shelter of his psychiatric ailment and treatment, however no such record has been placed and proved on record by him in support of his third contention. It has also been submitted that all these contradictory defences tried to be set/build up by the accused in the present case are not only contradictory but also are self destructive of each other as if in the opinion of the accused, the complainant was financially incapable of advancing such huge amount of loan to him then there was no need and occasion for him to have issued these cheques forming subject matter of the present complaint in favour of the complainant as alleged security for the loan sought to be obtained from him and in case if he was mentally & psychologically unfit then there was no need and occasion for him to have entered into an agreement with the complainant which has been duly placed and proved on record by the complainant as well as have also been placed on record by the accused in his defence during the cross examination of the complainant and hence in the light of aforesaid CC No. 509/06 Page 13 of

23 pages submissions, the case of the complainant stands duly proved against the accused beyond all reasonable doubts. Therefore, the accused is liable to be held guilty and convicted for an offence under Section 138 of Negotiable Instrument Act.

18. After hearing both the parties and the learned counsels as well as perusal of the documents placed and proved on record by them, I find more force in the submissions made by the learned counsel appearing for complainant as except for the date appearing on the cheques forming subject matter of the present complaint all the other particulars including the signatures of the drawer have been filled by him and written in the same ink and accused has also admitted their execution during his examination under Section 313 Cr.P.C. However, the sole defence taken by him was the issuance of cheques towards security of the loan and onus to prove his defence was heavily upon him which he had miserably failed to discharge. The words appearing in Section 139 of Negotiable Instrument Act as well as in Section 118 of Negotiable Instrument Act, "unless the contrary is proved" clearly indicate that presumptions have to be rebutted by the proof and not by a bare explanation which is merely plausible. Unless the explanation is CC No. 509/06 Page 14 of 23 pages supported by proof, the mandatory presumption created by the provisions cannot be said to have been rebutted as held in Habbalapa Dungappa Katti & Ors vs State of Karnataka 2001 (3) Crime 218 (SC) and also in case of Y. Sreelatha @ Raja vs Mukundchand Bothra 2202 (1) All India Banking Law Judgment 87 at para 31. Similarly it was held in Kundan Lal Rallaram Vs Custodian Evacuee Property, Bombay, AIR 1961 Supreme Court, 1316 that once there exists a presumption in favour of the complainant then it is for the accused to rebut the said presumption in law. Although there is no denial of the fact that in order to prove his defence by way of preponderance of probabilities, the accused is not at all required to step into the witness box as his sole witness and he is also at liberty to prove the same either from the material already available on record in the form of documents or from the cross examination of the complainant's witness or by referring to the circumstances attending to the facts of the particular case but even that has also not been done in the present case by the accused who has not only spoiled but had rather destroyed his own defence by taking three different and contradictory pleas on three different occasions.

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19. So far as the service of notice upon the accused is concerned, there is a bare denial on his part that no notice was served upon him. However, it is not the contention of the accused that the address mentioned on the face of legal notice or on the courier slip was not the address at which he was residing. Hence, the ratio of the case titled as MD Thoma vs PS Jalil (cited Supra) is not applicable to the facts of the present case because it is not the case of the complainant that notice was served upon his wife and not upon him personally. Although the accused had been disputing through out the execution of document Ex. CW1/G but he himself had relied upon the document Ex. CW1/D1&D2 which are also of similar nature bearing signatures and thumb impression of same witnesses and parties relating to different transactions. Therefore, once accused himself is placing reliance on such documents then it does not remain in his mouth to agitate their authenticity at a later stage in the present complaint.

20. So far as the contention regarding the insufficient income of complainant during the relevant period of time as mentioned in the income tax return filed by him on record for the relevant period is concerned, this court is not precluded from taking the CC No. 509/06 Page 16 of 23 pages judicial notice of the fact that the income tax return of this nature are prepared by well highly qualified experts and actual income of an individual earning his livelihood by a business or profession is seldomly reflected except for those of salaried persons as businessman show many expenses to claim taxable rebates and to bring down their actual taxable liabilities to the bare minimum, hence there remains always a huge gap/bridge between their gross income and net taxable income, therefore in the absence of audited balancesheet/ profit and loss account sheet filed by the complainant with the income tax authorities which could have also been summoned by the accused during his defence evidence it cannot be held that the gross income of the complainant also matched the figure of net taxable income as shown by him in his aforesaid income tax return. During the course of submissions, it was also pointed out that cheque nos involved in the case, the judgment of which has been relied upon by the complainant were also relevant in the context of the present complaint. I have gone through the same. The cheque no.363032 and 363009 pertained to be from the the same series of which cheques are involved in the present case. However, I do not find any merits in the contention of CC No. 509/06 Page 17 of 23 pages the learned defence counsel that cheques in the present case were manipulated by the complainant to extort money from accused because as per complainant's own version, the money was borrowed from him by the accused for a period of one year and he had filled the date and presented the same only after receiving the legal notice addressed to him by the father of the accused.

21. Alongwith the written submissions accused had also placed on record certain medical papers which have neither been tendered nor have been proved in evidence as per law and hence cannot be taken into consideration for any purpose whatsoever. Hence, the plea of accused regarding his suffering from some psychological disease has not been proved on record. However, even if for the sake of arguments it is presumed that same can be taken into consideration as well, then also they pertain to simple headache and some tension suffered by accused for which medicines were prescribed for him. It is a common affair that most of the population in a metropolitan city like Delhi always remains under some kind of stress or tension due to its fast life style and it cannot be considered to be a worry factor at all.

22. In view of my aforesaid lengthy discussion I have no hesitation in CC No. 509/06 Page 18 of 23 pages holding that on the one hand complainant has been able to prove his case against the accused beyond all reasonable doubts whereas on the other hand accused has miserably failed to set up his probable defence. Therefore, the accused is held guilty and convicted for offence under Section 138 of Negotiable Instrument Act. Let he be now heard on the quantum of sentence. (ANNOUNCED IN OPEN COURT ON 24.06.2011) (LOKESH KUMAR SHARMA ACMM/02, NORTH EAST, KARKARDOOMA COURTS :

DELHI CC No. 509/06 Page 19 of 23 pages IN THE COURT OF SHRI LOKESH KUMAR SHARMA : ACMM/ NORTH EAST, KARKARDOOMA COURTS, DELHI.  
Mahesh Kumar Vs. Sharad Srivastava U/S: 138 N. I. Act.

Unique I.D. No. 02402RO018332006 ORDER ON THE QUANTUM OF SENTENCE  
27.6.2011:

Present: Parties in person with their respective Ld. counsels.

Vide my judgment dtd. 24.6.2011 accused was held guilty and convicted for an offence under section 138 N. I. Act and case is fixed today for arguments and order on quantum of sentence.

Ld. counsel Shri Vijay Tyagi appearing for the complainant has submitted that complainant has fought a lengthy legal battle for about 7 years as he was deprived of his legitimate money by the accused and hence accused does not deserve any leniency from this court and must be awarded the maximum punishment provided for the offence.

Shri N. K. Bhaduria, Ld. counsel for accused on the other hand submitted that accused is the only son of his parents and is of 31 years of age and has already faced the agony of trial for seven years and some kind CC No. 509/06 Page 20 of 23 pages of leniency therefore be shown towards him.

After hearing both the parties, I am constrained to observe here that although Section 138 Negotiable Instruments Act constitutes an offence but it is a benevolent provision of law brought into statute book with the sole legislative intention of reposing the faith of general public in the sanctity of negotiable instruments. In order to give high credibility to the negotiable instruments such as cheques, promissory notes etc and with a view to ensure deterrence for the people committing frequent defaults in honouring their commitment by getting the negotiable instruments dishonoured, initially an imprisonment of one year was prescribed coupled with the fine up to the double of the cheque amount. However since the fruitful results were not yielded, hence the said punishment was found insufficient and by a latter amendment, it was enhanced up to imprisonment of either description up to two years coupled with the fine which may go up to twice of the cheque amount. Hon'ble Supreme Court in a recent judgment has held that courts must award compensation to the complainant so as to reduce his pains and miseries. Although the aforesaid directions issued by hon'ble superior courts have been issued to further strengthen the noble legislative intent behind incorporation of this Section of the general public welfare so that business, trade as well as economy gets a boost from the confidence reposed by the public in the credibility and authenticity of the negotiable CC No. 509/06 Page 21 of 23 pages instruments.

However, it is a sorry state of affairs to observe that cases of this nature are occupying the board of courts in large numbers every day. Instead of sending a message of deterrence to the public to refrain itself from indulging into such practices, the public is rather encouraged to get the cheques frequently dishonoured and thereafter refuse



to make their payment to the persons entitled to receive their legitimate dues thereby compelling them to knock the doors of justice which is always delayed and hence, impliedly denied to them as well. This results into further enhancement of pain and sufferings of complainant who is compelled to wonder in the corridors of justice for years and some times he is even compelled to agree to the offers made by clever accused persons to make payment of a lesser amount than their legitimate dues and that too, in piece meal in the form of petty installments. The situation can only be changed if courts of law come to the rescue of complainant and start awarding severe punishments which would send a deterring message among the law violators to avoid such litigations rather to prolong the same for years.

I am of the opinion that interest of justice shall be served if accused is awarded adequate sentence . Accordingly I am of the opinion that ends of justice shall be best served if convict is awarded to undergo rigorous imprisonment for 1 ½ year and is also directed to pay a fine of Rs. 4.5 lacs CC No. 509/06 Page 22 of 23 pages which shall be paid to the complainant as compensation. In default he shall have to further undergo SI for six months. In the event of default in payment of fine, same shall be recovered from him as arrears of land revenue.

ANNOUNCED IN OPEN COURT ON 27.06.2011) (LOKESH KUMAR SHARMA)  
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