

## Ashwani Khurana vs Anumod Sharma on 14 December, 2018

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IN THE COURT OF MS PRABH DEEP KAUR : METROPOLITAN MAGISTRATE -  
02 : SOUTH : SAKET COURT : NEW DELHI

ASHWANI KHURANA VS ANUMOD SHARMA  
CC NO. 469529/2016  
U/S 138 NEGOTIABLE INSTRUMENTS ACT

### JUDGMENT

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| (1) Serial number of the case                   | : | 469529/2016   |
| (2) Name of the complainant                     | : | Ashwani Khurana<br>S/o Late Sh I C Khurana<br>R/o No. 5, Green Avenue,<br>Vasant Kunj, New Delhi-70   |
| (3) Name of the accused,<br>parentage & address | : | Anumod Sharma<br>S/o Late Sh. Vishnu Dutt Sharma<br>R/o D 305A, Laburnum<br>Apartments, Sector-29,<br>Gurgaon, Haryana-122001<br><br>Also At :<br>P-2, Pent House, 18th Floor,<br>Laburnum Apartments,<br>Sector-29,<br>Gurgaon, Haryana-122001 |
| (4) Offence complained of or proved             | : | 138 Negotiable Instruments<br>Act, 1881   |
| (5) Plea of the accused                         | : | Pleaded not guilty  |
| (6) Final Order                                 | : | CONVICTED   |
| (7) Date of Institution                         | : | 26.09.2014  |
| (8) Date on which reserved for<br>judgment      | : | 30.11.2018  |
| (9) Date of Judgment                            | : | 14.12.2018  |

### BRIEF STATEMENT OF THE REASONS FOR THE DECISION

1. The brief facts of this case as carved out from the complaint are Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 that on 31.03.2014, accused took a short term loan of Rs01 crore from

the complainant for a period of one month on interest @18% per annum for which a loan agreement was executed between the complainant & accused. The accused issued a cheque towards repayment of loan amount, promissory note and request letter for the said loan. The complainant remitted & transferred the payment of Rs01 crore to the accused on 31.03.2014 through RTGS. The cheque handed over by accused bearing no. 728399 dated 30.04.2014 for Rs01 crore drawn on The Nainital Bank Ltd., branch Gurgaon was dishonoured on presentation with remarks "Funds Insufficient" vide memo dated 15.07.2014. Thereafter, on failure of accused to pay the cheque amount, a legal demand notice dated 12.08.2014 was sent to the accused which was deemed to be duly served upon the accused. Despite that payment of the cheque in question was not made by the accused within the stipulated time of 15 days. Hence, the complaint.

2. In the pre-summoning evidence, affidavit by way of evidence Ex.CW1/1 was filed by the complainant. In his affidavit of evidence Ex.CW1/1, the complainant reiterated all the averments made in his complaint and relied on documents ExCW1/A to ExCW1/N which are the loan agreement ExCW1/A, receipt dated 31.03.2014 ExCW1/B, request letter for loan and cheque tendered by accused dated 30.04.2014 ExCW1/C & ExCW1/D, undertaking ExCW1/E, return memo dated 15.07.2014 ExCW1/F, letter dated 15.09.2014 ExCW1/G, legal notice ExCW1/H, AD receipts ExCW1/I, postal receipts ExCW1/J, returned regd. AD envelopes ExCW1/K & ExCW1/L, returned speed post envelopes Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 ExCW1/M & ExCW1/N. After closure of pre-summoning evidence, since sufficient material was found against the accused, summoning order u/s 204 CrPC was passed against the accused vide order dated 26.09.2014.

3. Accused appeared pursuant to issuance of summons and notice U/s 251 CrPC was served upon the accused vide order dated 04.06.2015 to which the accused pleaded not guilty and claimed trial.

4. Thereafter, since the application U/s 145(2) N I Act to cross examine complainant and his witnesses was not moved by the accused, matter was fixed for recording plea of accused U/s 263(g) r/w 281 CrPC. Thereafter, vide order dated 09.02.2017, the application of accused U/s 145(2) N I Act was allowed and accused was given opportunity examine complainant and its witnesses.

Complainant was duly cross examined by Sh Vinay Shukla, Ld counsel for the accused and no other witness was produced by the complainant and vide separate statement of the complainant, CE was closed vide order dated 01.06.2017.

5. Thereafter, the plea of the accused Anumod Sharma u/s 313 r/w 281 CrPC was recorded vide order dated 11.10.2017, wherein, all material existing on record including the exhibited documents were put to accused. The accused stated that the amount of Rs01 crore was taken for the purpose of purchase of property and the cheque was given as security. The agreement, receipt etc were executed as a formality only as generally is done in such kind of Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 transactions. Accused further stated that the cheque was issued but as security. The complainant was supposed to buy a property from him and there were regular transactions between him and complainant even before the transaction in question. Accused further stated that he did not receive the legal notice. Accused further stated that complainant has deposed against him as the

value of property has gone down and the complainant is no more interested in purchasing the property and they could not settle the dispute.

Accused further expressed his desire to lead defence evidence.

6. Thereafter, matter was listed for DE and accused examined Sanjay Chaudhary as DW-1 & Pradeep Bhardwaj as DW-2 in his defence evidence. No other defence witness was produced by accused. Thus, vide separate statement of accused, DE was closed vide order dated 20.08.2018 and matter was fixed for final arguments.

7. Sh. S K Dhamija, Ld. Counsel for complainant and Sh. A S Rana and Sh S P Singh, Ld. Counsels for accused have addressed final arguments.

Written arguments have been filed on behalf of complainant and by way of oral arguments, Ld counsel for complainant has reiterated the written arguments.

On the other hand, by way of oral arguments, Ld. Counsel for accused has reiterated the defence of accused stated during trial and it has been further argued by the Ld counsel for the accused that the complainant has not proved that amount of Rs01 crore has been paid to the accused through RTGS. It has been further argued that the agreement ExCW1/A reveals that the Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 certificate has been issued on 24.07.2013 and agreement has been executed on 31.03.2014 and even the limitation of stamp paper got expired on the date of execution of loan agreement on the stamp paper. It has been further argued that the loan agreement was got signed by the complainant but intentionally the details of RTGS were kept blank and it is clear from the perusal of loan agreement ExCW1/A that except for the RTGS details, all things have been typed and there are no counter sign on the hand written RTGS details which proves that details were filled later on just to play fraud upon the accused. It has been further argued that as per clause No. 2 of loan agreement ExCW1/A, the accused had issued PDC only for the purpose of security which has been misused by the complainant. It has been further argued that in para no. 4 of loan agreement ExCW1/A, there is mention of pronote and complainant has intentionally not filed the pronote to withhold material facts. It has been further argued that the receipt ExCW1/B reveals that the RTGS details have been written by hand and there are no counter signatures of either of the parties on the hand written RTGS details which proves that these documents were signed by the accused only for the namesake and at that time, the details were blank which complainant filled later on. Further, the alleged loan agreement has been signed by the parties and not by any of the witnesses nor the same has been attested by any authority which proves that documents ExCW1/A to ExCW1/C are forged & fabricated. The blank signed cheque was given only for the purpose of security and DW2 has duly proved the same. It has been further argued that the RTGS details have not been mentioned on the documents at the Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 time of taking signatures of the accused despite the fact that RTGS No. is generally generated immediately and despite specific objections of the accused, complainant has not filed any proof that the said amount has been credited in the account of accused and the documents filed by the complainant along with the written arguments cannot be looked upon at this stage. It has been further argued that complainant has intentionally sent legal notice on incomplete address and the

returned envelopes are already on record. Complainant has added Sector 29 in the address of accused intentionally to manipulate the things. It has been further argued that the agreement ExCW1/A cannot be read in evidence in view of Section 68 of Indian Evidence Act being unattested document and in view of Section 33 of Indian Stamps Act, the same is liable to be impounded being under stamped. Further as per Section 52 of Stamps Act, the stamp papers are valid for 06 months only and after 06 months, stamp papers become stale, therefore, the loan agreement being executed on stale e- stamp papers cannot be read in evidence. It has been further argued that only because one document has been exhibited, same cannot be considered as properly proved and thus the complainant has failed to prove the documents. It has been further argued that as per complainant, he had given Rs01 crore as loan but the same is barred under Punjab Money Laundering Act as a loan worth more than Rs20,000/- cannot be given by an individual person. Further, admittedly till date, complainant has not filed any civil case which reflects the intentions of the complainant that complainant wants to extort money and wants to avoid payment of revenue/court fees. It has been further argued that Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 the complainant has failed to prove its case while accused has proved his defence. The accused is required to show only a probable defence and accused has been able to discharge his part of burden of proof while complainant failed to prove its own case, therefore, the accused is liable to be acquitted.

8. Arguments advanced by both parties heard. Case file perused meticulously.

9. In order to prove an offence under Section 138 NI Act, following ingredients are required to be fulfilled :

- i) That there is legally enforceable debt or liability;
- ii) The drawer of the cheque issued the cheque to discharge in part or whole the said legally enforceable debt or liability,
- iii) The cheque so issued was returned unpaid by the banker of the drawer.
- iv) Legal demand notice was served upon the accused and the accused failed to make the payment within 15 days of the receipt of the said notice.

10. In the case at hand, the issuance of the cheque in question and its dishonour are not in dispute. The defence raised by the accused is two fold. Firstly, the non receipt of legal notice dated 12.08.2014 Ex.CW1/H, secondly, the cheque in question was issued only for the purpose of security. Now, this Court shall deal with the defences of the accused one by one.

10A. FIRST DEFENCE - NON RECEIPT OF LEGAL NOTICE A1. One line of defence taken by the accused is that he has never received the legal notice of demand dated 12.08.2014 Ex.CW1/H sent on both the addresses of accused of Gurgaon. One of the essential ingredients for proving an offence U/s 138 N I Act is the sending of the legal notice of demand. Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 The complainant has deposed that the legal notice of demand dated 12.08.2014 Ex.CW1/H was sent to the accused on the correct addresses through registered post, the

receipts of speed post are Ex.CW1/I & ExCW1/J and the undelivered returned envelopes are ExCW1/K to ExCW1/N. A2. Section 114 of Evidence Act, 1872 is applicable to communications sent by post and it enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the General Clauses Act envisages that when a registered notice is posted, it is presumed to have been served unless rebuttal is given.

A3. In CC Alavi Haji Vs. Palapetty Muhammed & Anr. (Crl. Appeal No. 767 of 2007), the Hon'ble Apex Court has held --

"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 u/s. 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 along-with the copy of the complaint u/s. 138 of the Act, cannot obviously contend that there was no proper service of notice as required u/s. 138, by ignoring statutory presumption to the contrary u/s. 27 of the General Clauses Act and Section 114 of the Evidence Act".

A4. The accused has taken plea that legal notice was intentionally sent on wrong address as Sec 29 was intentionally written on the address of accused. Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 Perusal of record shows that accused has been served with the summons of the present complaint on the same addresses on which legal notice has been sent. Further, accused furnished bail bonds on 31.03.2015 in which the same address has been mentioned by the accused. Further, accused has filed an application for cancellation of NBWs on 09.01.2017 and in the supporting affidavit to this application, accused has mentioned the same address on which legal notice has been served. Further, during final arguments, Ld counsel for complainant has filed copy of revision petition filed by the accused against the order dated 07.06.2018 and in the memo of parties of the revision petition, accused has mentioned the same address. Thus, in view of the above discussion, this court holds that the legal notice dated 12.08.2014 Ex.CW1/H was served on the accused.

**10B. SECOND DEFENCE - CHEQUE IN QUESTION NOT BEING GIVEN AGAINST ANY CONSIDERATION** B1. As per complainant, he had given short term loan of Rs01 crore by way of RTGS to accused on 31.03.2014 vide loan agreement and accused issued cheque in question to return the principal amount.

B2. On the other hand, accused had taken defence that he had taken the amount for the purpose of purchase of property and cheque & signed agreement receipt etc were given only as security & formality. Further due to decrease in valuation of property, complainant became disinterested in purchasing the property and dispute could not be settled. B3. It is a well settled position of law that when a negotiable Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 instrument is drawn, two statutory presumptions arises in favour of the complaint, one under Section 139 NI Act and

another under Section 118(a) of the NI Act. Further, the court will presume a negotiable instrument for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or consider the non existence of the consideration so probable that a prudent person may ought under the circumstances of the particular case to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. Reliance placed on *M.S. Narayana Menon v. State of Kerala*, (2006) 6 SCC 39).

B4. In the present case, throughout trial accused has nowhere disputed that he had received amount of Rs01 crore on 31.03.2014 by way of RTGS and he also executed loan agreement ExCW1/A and receipt ExCWD1/B and had written request letter for loan ExCW1/C and undertaking to repay the loan ExCW1/E. Now, during final arguments, the counsel for accused has vehemently disputed the receipt of amount. However, the accused has nowhere disputed the receipt of amount. Rather in the plea recorded U/s 313 CrPC, accused admitted that he had taken amount for the purchase of property. Even during cross examination of complainant, no suggestion has been given that complainant has not paid the amount Therefore, the objections of Ld counsel for accused during final arguments as to receipt of amount through RTGS are merit-less.

Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 Further, during final arguments, Ld counsel for accused has taken objections to the loan agreement ExCW1/A and has argued that the loan agreement has been executed on the stale stamp papers as per Section 52 of Stamps Act and further, Ld counsel for accused has argued that the loan agreement ExCW1/A cannot be read in evidence in view of Section 33 of Indian Stamp Act r/w Section 68 of Indian Evidence Act.

As far as this plea is concerned, the complainant has deposed that the agreement ExCW1/A was executed between parties and accused not only had written the letter of request for loan but undertaking also to return the amount. Throughout the trial, accused has nowhere disputed the same. Even during cross examination of complainant, no suggestion has been given to the complainant that the documents ExCW1/A to ExCW1/C are forged & fabricated. Rather in the plea recorded U/s 313 r/w 281 CrPC, accused specifically stated "the agreement, receipt etc were executed as a formality only as generally is done in such kind of transactions". Once the accused has admitted the execution of these documents, the objections of accused as to mode of proof of these documents are liable to be dismissed being merit-less. As far as the question as to admissibility is concerned, Section 33 of Indian Stamp Act, 1899 carves out an exception in cases of courts exercising criminal jurisdiction. As per proviso to the said section, nothing contained in the said section shall be deemed to require any Magistrate or Judge of Criminal Court to examine or impound any instrument coming before him in the course of any proceedings other than proceedings under Chapter XII or Chapter XXXVI of Criminal Procedure Code. *Ashwani Khurana vs Anumod Sharma CC No. 469529/2016* The present proceedings are not being carried out under Chapter XII or Chapter XXXVI of Criminal Procedure Code. Further, proviso to under Section 49 of The Registration Act clearly provides that an unregistered document can be taken into consideration for collateral purposes.

Further, it is settled principle that a document, which is not duly stamped and is also not registered though required to be registered can be admitted in evidence for collateral purposes under proviso to Section 49 of the Registration Act but so far as the stamp duty is concerned, if the document is not duly stamped, it has to be dealt u/s 35 of the Stamps Act. Hence, the said judgment is not on the applicability of Section 33 of Stamps Act in criminal cases and thus, not relevant for the purposes of deciding the plea of accused.

Therefore, in view of the above discussions and reasons, the objections of accused as to admissibility of loan agreement ExCW1/A are liable to be discarded being devoid of merits.

B5. During final arguments, it has also been argued on behalf of the accused that as per the complainant, he had given loan of Rs01 crore to the accused, however, this transaction is barred under Punjab Money Laundering Act. As far as this plea is concerned, the advancement of loan in violation of some statutory provisions or non disclosure of loan advanced by complainant to the accused may attract penal provisions under the Income Tax Act but the same has no consequences on the proceedings of the complaint U/s 138 N I Act. Moreover, the accused has nowhere adduced any evidence to prove that complainant is professional money lender. Therefore, in view of the principles of Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 unjust enrichment, the plea of the accused is not sustainable and the case of complainant cannot fail only on this ground that complainant failed to reflect the loan advanced to accused in his ITR. There are no evidence to prove that the case of complainant is barred under Punjab Money Laundering Act. B6. Further as far as the plea regarding issuance of blank signed cheques is concerned, the accused cannot escape his liability only on this ground because no law provides that in case of any negotiable instrument, entire body has to be written by the maker or drawer only. What is material is the signature of the drawer or maker and not the writing on the instrument. Hence, question of body writing/other contents except signatures is almost of no significance. In Ravi Chopra vs State 2008 (2) CC Cases (HC) 341, Delhi High Court rejected the application for obtaining opinion of the handwriting expert on the point whether particulars of name, date etc. were filled up at different times by testing the ink used and handwriting appearing though signatures on the cheque were admitted. Court while discussing various provisions of Negotiable Instrument Act held that giving of blank signed cheque is not barred under the Act and filling of material particulars in it even by the complainant subsequently would not amount to material alteration. The court also held that opinion of the expert, if received, that particulars of cheque were filled up at different times from that of signatures, itself would not prove that accused had no legal liability on the date of presentation of cheque, as alleged in defence.

It was further held by the Hon'ble High Court of Delhi in the case of Jammu & Kashmir Bank vs Abhishek Mittal (Crl. A No. 294/2001 decided on Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 26.05.2011 that :

"there is no law that a person drawing the cheque has to necessarily fill it up in his own handwriting. Once a blank cheque is signed and handed over, it means that a person signing it has given implied authority to the holder of the cheque to fill up the blank which he has left. A person issuing a blank cheque is supposed to understand

the consequences of doing so. He cannot escape his liability only on the ground that blank cheque had been issued by him".

Moreover, admittedly accused had taken Rs01 crore from the complainant and it is not the case of accused that the complainant has filled the amount arbitrarily. Further, no reason is coming forward why complainant would fill only amount of Rs01 crore when admittedly as per loan agreement ExC1, the accused was required to pay 18% interest too.

B7. Further, the accused has taken plea that the cheque was issued as security and accused has examined DW-1 Sanjay Chaudhary to support his defence. However, during cross examination, DW1 specifically deposed that he has no knowledge about the transaction in question nor the same has taken place in his presence. Therefore, the testimony of DW1 is of no help to the accused. Similarly, Pradeep Bhardwaj deposed that he handed over an envelope containing the cheque to the person coming from office of complainant and the word 'security' was mentioned on the cheque. However, during cross examination, DW2 specifically deposed that he has no knowledge about the loan agreement nor anything else about the transaction in question. Further, even for the sake of arguments, the plea of accused is considered, then it is settled principle that even a PDC issued for existing liability is a well known Ashwani Khurana vs Anumod Sharma CC No. 469529/2016 mode of payment. Further, the issuance of cheque in question even for the purpose of security implies the intention of parties to attach legal sanctity to their transaction and therefore, merely because the word security has been mentioned on the envelope does not mean that complainant cannot enforce the legal liability of the accused through security cheque. Therefore, the plea of security cheque is immaterial in the present complaint.

11. Therefore, in view of the above discussions and reasons, in the opinion of this Court, the presumptions arising in favour of the complainant U/s 118 & 139 of the Act have not been rebutted by the accused by preponderance of probabilities, whereas the complainant has proved his case beyond all reasonable doubts. Resultantly, this court finds the accused Anumod Sharma s/o Late Sh Vishnu Dutt Sharma guilty for the punishable U/s 138 N I Act. Hence, he stands convicted.

12. Let the convict be heard on the point of sentence on 25.01.2019. Copy of the judgment be given dasti to the convict.

Announced in the open court on 14.12.2018 (PRABH DEEP KAUR) Metropolitan Magistrate-02/N I Act/South Saket Court/New Delhi Certified that this judgment contains 15 pages and each page bears my signature.

(PRABH DEEP KAUR) Metropolitan Magistrate-02/N I Act/South Saket Court/New Delhi Ashwani Khurana vs Anumod Sharma CC No. 469529/2016