IN THE COURT OF MS. RADHA KULSHRESHTHA
JM FC (NI ACT) DIGITAL COURT-07, SOUTH-WEST
DWARKA COURTS, NEW DELHI

CC NI ACT NO: 49/2020

CNR / Case No. DLSW020339892020

Zakir Qureshi
S/o Sh. Mahmood Qureshi
R/o 41B, DDA, Janta Flats,
Manglapuri, New Delhi – 110045 ....Complainant

Versus

Shaiwal Verma
S/o Sh. Sudhir Kumar Verma
R/o K-11, Near Old Rangpuri Road,
Mahipalpur, New Delhi - 110037 ....Accused

Offence Complained of or proved	:	Under Section 138 of Negotiable Instruments Act, 1881
Plea of the Accused	:	Pleaded not guilty
Date of filing	:	23.11.2020
Date of Institution	:	25.11.2020
Date of reserving judgment/order	:	24.07.2024
Final Order/Judgment	:	Convicted
Date of pronouncement	:	**05.08.2024**

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<u>JUDGMENT:</u>

1. Vide this Judgment, I will dispose of the present complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "NI Act") filed by the complainant against accused on account of dishonour of a cheque bearing number 000004 dated 20.09.2020 for a sum of Rs. 2,50,000/- drawn on HDFC Bank, Shop No.17A, Ground Floor, Vasant Square Mall, New Delhi (hereinafter referred to as the cheque in question).

A. BRIEF FACTS OF THE CASE

2. The complainant was having friendly relation with the accused person from last many years and accused approached the complainant for friendly loan of Rs.4,50,000/- and complainant provided the said amount i.e. Rs.4,25,000/- in cash and Rs.25,000/- through NEFT on 16.11.2019 and accused promised to return the same up to 16.05.2020**.** The accused in discharge of his legal liability against the abovesaid friendly loan issued two cheques bearing number 000004 dated 20.09.2020 for a sum of Rs. 2,50,000/- and another cheque bearing number 000005 dated 28.05.2019 for a sum of Rs. 2,00,000/- both drawn on HDFC Bank, Shop No.17A, Ground Floor, Vasant Square Mall, New Delhi with assurance that the same will be honoured on presentation. That after stipulated time, the complainant requested the accused to return the said loan but accused made excuse of Covid-19 pandemic and sought more time. That after some time, the accused allowed the complainant to present the said cheques in his bank. That complainant on 13.07.2020, presented the cheque bearing number 000005 dated 28.05.2019 for a sum of Rs. 2,00,000/- and another cheque 000004 dated 20.09.2020 for a sum of Rs. 2,50,000/- on 01.10.2020. However, both the cheques were dishonoured with remarks “Payment Stopped by Drawer” and “Funds Insufficient” respectively. That complainant informed the accused about dishonour of the cheques and requested to repay the said loan amount, however, accused flatly refused to repay the said loan amount.

3. A legal demand notice, dated 05.10.2020, was thereafter served by complainant upon the accused to which the accused replied through his counsel and since, according to the complainant, the accused has failed to make the payment of the cheque amount in question to the complainant, despite service of legal notice of demand, the accused has committed an offence under Section 138 of the NI Act, 1881.

B. APPEARANCE OF ACCUSED, NOTICE AND ADMISSION AND DENIAL OF DOCUMENTS

4. Upon receipt of the complaint, cognizance of the offence was taken qua cheque bearing no.000004 and Ld. Counsel for the accused accepted summons on behalf of the accused vide order dated 04.03.2021. Accused appeared and was admitted to bail. Thereafter, a separate notice explaining accusations to the accused under Section 138 of the Negotiable Instruments Act, 1881 was served upon him in terms of Section 251 Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC) on 08.04.2021. Accused pleaded not guilty and claimed trial. Further, the following plea of defence was taken by the accused at the time of framing of notice: -

"I have not taken any friendly loan from the complainant. I had only purchased non-veg articles (chicken, mutton etc.) from the complainant for my restaurant on credit. I have already made cash payment to the complainant qua the abovementioned transaction. The complainant had also taken three security cheques from me qua the abovementioned transaction which were to be returned after payment. However, the security cheques were not returned to me as the complainant had stated that the cheques are in his shop his shop is closed due to lockdown. The complainant has misused the said security cheques and has filed the present complaint by misusing two security cheques out of the above-mentioned three security cheques. The complainant has also misused the third security cheque and has filed one more complaint against me through his relative Iqbal Qureshi in order to defame me."

5. Statement of the accused regarding admission/denial of documents was recorded under Section 294 CrPC on 08.04.2021. Accused has admitted that the cheque in question is from his bank account. The signature on the cheque, the return memo and receipt of legal demand notice were also admitted by the accused.

6. Thereafter, accused was allowed to cross examine the complainant after his oral application u/s 145(2) of NI Act was allowed vide order dated 08.04.2021.

C. COMPLAINANT'S EVIDENCE

7. During the trial, the complainant has led the following oral and documentary evidence: -

ORAL EVIDENCE

CW-1	Complainant tendered his evidence by way of affidavit and the same is **Ex. CW-1/A**.

DOCUMENTARY EVIDENCE

Ex. CW-1/1	Cheque in question bearing no.000004 dated 20.09.2020 for an amount of Rs. 2,50,000/-
Ex. CW-1/2	Return memo dated 03.10.2020
Ex. CW-1/3	Legal Demand Notice dated 05.10.2020
Ex. CW-1/4	Postal receipt of legal demand notice
Ex. CW-1/5	Tracking report along with Certificate u/s 65-B of Indian Evidence Act, 1872
Ex. CW-1/6	Reply dated 27.10.2020 to legal demand notice.

CW-1 was duly cross-examined by the Ld. Counsel for the accused. CE was closed vide order dated 18.04.2023.

D. STATEMENT OF ACCUSED

8. Thereafter, the statement of the accused was recorded without oath u/s 313 CrPC to allow him to personally explain the circumstances appearing in evidence against him. In his statement u/s 313 CrPC, the accused denied all the allegations against him. Further, the following plea of defence was taken by the accused at the time of recording statement of accused u/s 313 CrPC: -

> *"I had taken financial assistance of Rs.2,50,000/- from the complainant in November 2019 in front of two witnesses who are friends of the complainant only. However, I have repaid Rs.2,30,000/- to the complainant and only Rs.20,000/- is outstanding. I had asked the complainant to return my cheques. However, the complainant did not return my cheques. The complainant has misused my cheques including the Cheque in question Ex. CW-1/1 bearing no.000004 dated 20.09.2020 for an amount of Rs. 2,50,000/- and has filed the present complaint against me which is false and fabricated. The complainant has taken three cheques including the cheque in question Ex. CW-1/1 from me forcefully from the dashboard of my car"*

E. DEFENCE EVIDENCE

9. Despite being given several opportunities, accused failed to lead any evidence and accordingly, right of accused to lead DE was closed vide order dated 09.01.2024 and matter was fixed for final arguments.

F. FINAL ARGUMENTS

10. Final arguments on behalf of the parties were thereafter heard on 23.07.2024 and 24.07.2024.

11. It is submitted by Ld. Counsel for the Complainant that the complainant has been able to prove all the ingredients of offence under Section 138 of the Negotiable Instruments Act, 1881. He submitted that the accused has admitted that the cheque in question **Ex. CW-1/1** is from his bank account and he has also admitted his signature on the Cheque in question **Ex. CW-1/1**. In view of his admission, according to Ld. Counsel for complainant, a presumption arises in favor of complainant that the cheque in question was issued by the accused in discharge of his legally enforceable debt or liability towards the complainant. He submitted that the accused has not been able to raise a probable defence to rebut the aforesaid presumption, even on the touchstone of preponderance of probabilities, as the accused has not taken any action or initiated any proceedings against the complainant, if the cheque in question **Ex. CW-1/1** has been misused by the complainant, as has been alleged by the accused.

12. Per Contra, it is submitted by Ld. Counsel for the accused that the complainant never advanced any friendly loan of Rs. 4,50,000 to the accused but had only advanced loan of Rs. 2,50,000/- out of which Rs. 2,30,000/- has been repaid and only Rs. 20,000/- is remaining. The onus to prove the alleged loan transaction in question between the complainant and the accused is on the complainant. The complainant has not produced a single document (viz acknowledgement, promissory note etc.) in support of the alleged loan transaction in question and it is difficult to believe that someone would give an amount of Rs. 4,50,000/- to a person in cash without any documentary proof. It is further submitted by Ld. Counsel for the accused that the complainant has not been able to prove his financial capacity to advance a friendly loan of Rs. 4.5 Lacs to the accused and therefore, accused may be acquitted. Ld. Counsel for the accused has relied on the following judgments:

(i) Rangappa Vs. Sri Mohan, (2010) 11 Supreme Court Cases 441.
(ii) Devender Kumar Vs. Khem Chand, 2015 SCC OnLine Del 12578.
(iii) Dameen (Bhameen) Vs. Shahjahan & Anr., 2024

SCC OnLine Ker 3377.

G. DISCUSSION ON PRINCIPLES OF LAW

13. Before the appreciation of evidence and reflecting upon the defence of the accused, the foremost question that arises before this court is **whether the requirements of Section 138 Negotiable Instruments Act, 1881 are met in the present matter in order for the offence u/s. 138 NI Act to be made out?**

14. In order to prove the application of Section 138, NI Act, the complainant has to prove the following ingredients:

i. ***The cheque was drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person, from out of that account, for the discharge, in whole or in part, of any debt or liability.***

"Debt or other liability" means a legally enforceable debt or other liability

ii. ***The cheque has been presented to the bank <u>within a period of</u> <u>three months</u> from the date on which it is drawn or within the period of its validity, whichever is earlier.***

iii. ***The cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that 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 that bank***

iv. ***The payee or the holder in due course of the cheque, as the case may be, has made a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.***

v. ***The drawer of the cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.***

H. REASONS FOR THE DECISION

15. In the present matter, it is not disputed and in fact admitted that the signatures on the cheque in question are that of the accused. The accused has also admitted the genuineness of the return memo as well as the receipt of the legal demand notice from the complainant. It is also not disputed that a clear demand for payment of the cheque amount has been made in the legal demand notice. Perusal of the record and of the cheque, return memo and legal demand notice well establishes the fact that the present case is within my jurisdiction and well within the period of limitation.

16. It is also important to note that the complainant has initially filed the present complaint for the dishonour of two cheques, the cheque bearing number 000005 dated 28.05.2019 for a sum of Rs. 2,00,000/- and another cheque 000004 dated 20.09.2020 for a sum of Rs. 2,50,000/-. However, vide order dated 04.03.2021, this court found the cheque bearing number 000005 dated 28.05.2019 for a sum of Rs. 2,00,000/- is out of the prescribed period of limitation and hence, the present case pertains to dishonour of cheque bearing number 000004 dated 20.09.2020 issued by the accused for a sum of Rs. 2,50,000/- only.

17. The undisputed/admitted facts of the present matter establishes that the **ingredients mentioned in clause (ii), (iii), (iv) & (v) are fulfilled.**

18. However, in order for the complainant to prove its case beyond reasonable doubt, all the ingredients of Section 138 have to be independently proved. In order for an offence u/s. 138 NI Act, the most important ingredient that needs to be proved is that **'the cheque was issued towards the discharge of any debt or legal liability.'**

19. It is pertinent to discuss that every negotiable instrument including a cheque carries with it certain presumptions which have been clearly laid down in Section 118(a) and Section 139 of NI Act and are reproduced as below:

118. Presumptions as to negotiable instruments*.* *—Until the contrary is proved, the following presumptions shall be made: —*

(a) of consideration: —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

139. Presumption in favour of holder. *— It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section138 for the discharge, in whole or in part, of any debt or other liability.*

20. Conjoint reading of the abovementioned provisions prima facie lays down that it is safe to presume that the ingredient mentioned in **clause (i)** has been established beyond reasonable doubt against the accused.

21. However, in order to rebut the presumption, the onus shifts upon the accused to prove that the cheque in question was not issued towards discharge of any debt or legal liability.

The accused need not prove his case beyond reasonable doubt but only has to establish a plausible defence acceptable to the court.

22. In order for the accused to rebut the above-mentioned presumption, reliance can be placed upon ***Basalingappa vs Mudibasappa reported in (2019) 5 SCC 418*** reiterated as below:

> *"25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference or preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely."*

23. In the backdrop of legal position as enunciated above, it is to be examined by this Court that whether the accused on a scale of preponderance of probabilities has been able to rebut the presumption which has been raised against him and in favour of the complainant, or has been able to demolish the case of the complainant to such extent so as to shift the onus placed upon the accused again on the complainant.

24. It is averred by the complainant in his complaint that accused had in fact, taken a friendly loan of Rs. 4,50,000/- from him out of which Rs. 4,25,000/- was given in cash and Rs. 25,000/- was transferred through NEFT. However, there is no receipt or acknowledgment of the loan amount nor there is any financial agreement to that effect.

25. Per Contra, the first defence of the accused which has been brought out after reading his reply to the legal demand notice dated 27.10.2020 that the accused had taken a loan of Rs. 2,50,000/- from the complainant and out of which Rs. 2,00,000/- has been repaid and the complainant refused to accept the payment of remaining Rs. 50,000/-. However, to the contrary what the accused has averred in his reply to legal demand notice, the defence of the accused in notice framed against him u/s 251 Cr.P.C broadly revolves around the fact that he has not taken any loan from the complainant but had only purchased some non-veg articles on credit from the complainant as the complainant runs a meat shop and the cheques in question were given as security for the aforementioned transaction which were to be returned after the payment. Further, it is important to note that the accused in his Statement u/s 313 Cr.P.C stated that he had indeed taken financial assistance to the tune of Rs. 2,50,000/- from the complainant in November 2019 in front of two witnesses who were the friends of complainant only. The accused further stated that he has already repaid Rs. 2,30,000/- out of the loan amount and only Rs. 20,000/- is remaining. With regard to the cheque in question, the accused stated that the said cheques were taken by the complainant forcefully from the dashboard of his car. He further stated that the present cheques in question were misused by the complainant.

26. It is pertinent to note that the accused has admitted that he had taken financial assistance from the complainant to the tune of Rs. 2,50,000/- which he had repaid and only Rs. 20,000/- is remaining. However, apart from oral averments, there is no cogent or reliable evidence to show that he has repaid the majority of the loan amount and in fact only Rs. 20,000/- is remaining. Thus, in absence of any oral as well as documentary evidence, this defence version of the accused without any proof is not tenable at all and cannot be sustained. Reliance in this regard can also be placed on the decision of Hon'ble Supreme Court of India in case of **Sumeti Vij vs. Paramount Tech Fab Industries (Cr. A 292 of 2021)** in which it has been held that "*the statement of the accused recorded u/s 313 of the Code is not substantive evidence of defence, but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of the accused*".

27. Ld. Counsel for the accused in his final arguments also raised a contention for the version taken by the accused in the application filed by the accused u/s 145(2) of N.I. Act and stated that the accused had repaid the loan amount of Rs. 2,30,000/- in presence of two witnesses but none of them were examined by the accused in his defence.

28. The accused has also stated in his notice u/s. 251 Cr.P.C. that the complainant had taken the cheques in question forcefully from the dashboard of his car. In this regard, it is pertinent to note that mere averments made in the application u/s 145(2) N.I. Act cannot be treated as the evidence in the present matter. Moreover, even if we consider the facts averred by the accused in his aforesaid application, in order to prove his version that cheques of the accused were forcefully taken by the complainant, accused has not produced any substantive evidence before this Court. In fact, he has not produced any evidence at all. Moreover, the accused has not even filed a single complaint before the appropriate authorities Police or otherwise for the forceful taking of his cheques in dispute against the complainant till date. Thus, in absence of any oral as well as documentary evidence, this defence version of the accused without any proof is not tenable at all and cannot be sustained.

29. Further, Ld. Counsel for the accused has argued during final arguments that even though it has been admitted by the complainant in his cross-examination that he duly files the ITR however, the fact of granting loan of Rs. 4,50,000/- has not been mentioned in the ITR proves that in fact, no such loan was ever granted to the accused. Firstly, it has been admitted by the accused in his Statement u/s. 313 Cr.P.C. that he had taken a loan of Rs. 2,50,000/- from the complainant.

30. Secondly, Chapter XXB (Sections 269SS to 269TT) of the Income Tax Act 1961 deals with the provisions related to ***"Requirement as to mode of acceptance payment or repayment in certain cases to counteract evasion of tax."*** Section 269SS of IT Act 1961 provides for "Mode of taking or accepting certain loans, deposits and specified sum. Section 269SS of the IT ACT, 1961 provides:-

> *no person shall take or accept from any other person any loan or deposit or any specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, if the amount is more than Rs. 20,000.*

31. Section 269ST of the IT ACT, 1961 deals with ***"Mode of undertaking transactions"*** and provides: -

no person shall receive an amount of two lakh rupees or more— (a) in aggregate from a person in a day; or (b) in respect of a single transaction; or (c) in respect of transactions relating to one event or occasion from a person, otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed.

32. Thus, it is clear that Section 269SS and Section 269ST of the IT Act, 1961 only provides the mode of acceptance, payment or repayment in certain cases so as to counteract evasion of tax but it does not declare cash transactions null and void and it does not make the amount paid irrecoverable. Cash transactions of more than the prescribed amount may attract penalty under IT Act, 1961 but it does not render the cash paid irrecoverable.

33. Lastly, even if it is believed that the cheque in question was a security cheque as averred by the accused in his notice u/s. 251 Cr.P.C., it is a well settled principle of law laid down by the Hon'ble Supreme Court in ***Sripati Singh (since deceased) Through His Son Gaurav Singh vs. State of Jharkhand & Anr., Criminal Appeal No. 1269-***

1270 of 2021 (Arising out of SLP (CRL) No. 252-253 of 2020), observed and held as under:

> *"16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. „Security" in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.*
>
> ....

22. These aspects would prima-facie indicate that there was a transaction between the parties towards which a legally recoverable debt was claimed by the appellant and the cheque issued by the respondent No.2 was presented. On such cheque being dishonoured, cause of action had arisen for issuing a notice and presenting the criminal complaint under Section 138 of N.I. Act on the payment not being made. The further defence as to whether the loan had been discharged as agreed by respondent No.2 and in that circumstance the cheque which had been issued as security had not remained live for payment subsequent thereto etc. at best can be a defence for the respondent No.2 to be put forth and to be established in the trial. In any event, it was not a case for the Court to either refuse to take cognizance or to discharge the respondent No.2 in the manner it has been done by the High Court. Therefore, though a criminal complaint under Section 420 IPC was not sustainable in the facts and circumstances of the instant case, the complaint under section 138 of the N.I Act was maintainable and all contentions and the defence were to be considered during the course of the trial."

34. In the present case, the accused has given contradictory statements with regard to the transaction between the complainant and accused at various stages of the trial. Even otherwise, in the cross-examination of the complainant, Ld. Counsel for the accused has not been able to extract anything which would show that transaction in question had not taken place between the complainant and the accused.

35. In the present case, with regard to the cheque in question, it is the oral testimony of the complainant versus the oral testimony of the accused. Meaning thereby, the complainant in the present case has not been able to prove that he had given a loan amount duly filled in the cheque in question to the accused but the complainant has presumptions of law in his favour whereas the accused has not been able to bring on record any such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Hence, there is no acceptable reason to disbelieve the testimony of the complainant on this point. In the humble opinion of this court, the judgments relied upon the accused side, are not applicable to the present case, as in the present case, the defence taken by the accused is contradictory and does not inspire confidence.

36. Thus, the accused has not been able to rebut the presumptions raised in favour of the complainant even on the touchstone of preponderance of probabilities and therefore, the onus has not shifted to the complainant to prove the oral cash transaction in question. For the reasons stated before, it can be adduced that on a scale of probabilities, the accused has failed to rebut the presumption against him and hence, **the ingredient under clause (i) has been sufficiently established.**

I. DECISION

37. In view of the above discussion, the complainant has been successful in proving his case as per law. Consequently, accused is held guilty for the offence under Section 138 of the Negotiable Instruments Act, 1881.

38. Accused is, thus, convicted for the offence under Section 138 of the Negotiable Instruments Act, 1881.

39. Ordered accordingly.

Announced in the Open Court on 05.08.2024
This Judgment consists of 23 signed pages.
Copy of the judgment be given to the convict free of cost.

RADHA KULSHRESHTHA
JM FC (NI ACT) Digital Court-07
South West, Dwarka Courts, New Delhi
05.08.2024