IN THE COURT OF SONIA, JUDICIAL MAGISTRATE FIRST CLASS, GURUGRAM.
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CNR No.HRGR03-010700-2016
CIS No.: NACT/5025/2016
Date of Institution: 21.04.2016
Date of Decision:- 12.11.2024

Rajeev Yadav S/o Late Sh. Ram Chander Yadav R/o House no. 301/B, Mianwali Colony, Gurugram.

.....Complainant.

Versus

Manoj Kumar S/o Sh. Rampal R/o Village Siraska Tehsil Sohna, District Gurugram, Haryana.

...Accused.

Complaint under Section 138 of the Negotiable Instruments Act.

Present: Complainant in person with Sh. Sandeep Chaudhary, Advocate.
Accused on bail with Sh. Niranjan, Advocate.

JUDGMENT:

The present complaint has been filed by complainant Rajeev under section 138 of the Negotiable Instruments Act (hereinafter referred as Act) against accused Manoj Kumar.

2) In brief, it is the case of complainant that the accused obtained friendly loan of Rs 6 lac on 08.01.2016 from the complainant by promising to refund the same on 15.01.2016 to meet his urgent requirement. Accused gave an affidavit dated 01.08.2016 and also issued a cheque no 002195 dated 15.01.2016 in favor of complainant. Complainant presented the said cheque with his banker Axis Bank,

Gurugram on 21.01.2016 but the same was returned unpaid with remarks "insufficient funds". Accused assured the complainant that he was arranging the funds and on 29.02.2016, complainant presented the said cheque again. Believing the version of accused, complainant did not start criminal prosecution and again presented the cheque on 29.02.2016 but the same was again dishonored with the same reason. Complainant sent a legal notice dated 09.03.2016 giving an opportunity to the accused for payment of cheque amount within 15 days but to no effect. Hence, the present complaint.

3) In preliminary evidence, complainant himself appeared as CW1 and tendered into his evidence his affidavit Ex.CA and the documents Ex.C1 to Ex.C6 i.e. cheque in question, agreement, return memo, legal notice, postal receipt and thereafter, the preliminary evidence was closed vide his separate statement.

4) Upon appearance of accused after notice, notice of accusation was served upon him vide order dated 04.01.2024, to which he did not plead guilty and claimed trial.

5) In the plea of defence, accused stated that the cheque in question was drawn from his bank account and the same bears his signature but he was not acquainted with the complainant. He never had any transaction with the complainant and he did not execute any affidavit in admission of any borrowing from complainant. He also stated that he

had given a blank signed cheque to Ashok Kumar as security but he did not know how the cheque in question had come in the possession of complainant. His security cheque has been misused and he did not owe any liability towards the complainant. He did not receive legal notice and has been falsely implicated in the present matter. He opted to meet evidence in his defence.

6) To prove his case, complainant himself appeared as CW1 and tendered his affidavit Ex.CW1/A wherein he has reiterated the version of his complaint in letter and spirit. However, in his cross examination, he stated that he was an advocate by profession. Accused used to come to him alongwith his friend Ashok Kumar so he got acquainted with the accused in Dec, 2015. Ashok was working in Haryana Police. He stated that Manoj came to his home but he used to talk to him telephonically. He never met the parents of Manoj and he gave the amount of loan to Manoj in a friendship of one month. The amount of loan was given in cash in the Tehsil and at that time, Ashok and one other person was also present whose name he did not remember. Ashok was not made a witness on the affidavit and the affidavit was not entered in the register of Notary. The amount of Rs 6 lacs was taken from his wife and brother and the said amount has been shown in his ITR. He produced his ITR of year 2016-17 and admitted that in the said ITR, gross total income of year 2015-16 was 543371. His mother was aged about 80 years and his wife

was doing a business. There is no registration number of the notary on document Ex C2. The affidavit Ex C2 bears the name and signature of witness mainly Akbar S/o Amlu but Akbar was not known to him. None of the witnesses on Ex C2 was known to him. He did not know whether Manoj signed the register of stamp vendor or not. He informed about the cheque bounce to their common friend Ashok but Ashok did not assure anything. The name, date and amount on the cheque Ex C1 were filled by Manoj. It was not a security cheque. All the other suggestions were denied by witness.

7) In defence evidence, accused himself appeared as DW 1 and stated that he was known to Ashok Kumar since 2012-13 and in the year 2015, he borrowed a loan of Rs. 1,50,000 from Ashok Kumar in view of which, he gave Ashok a blank security cheque which was not filled with the amount and date. He repaid the loan amount to Ashok Kumar in November,2015 and asked for the return of security cheque in which, Ashok stated that the same has been misplaced. When police came to arrest him, he got to know about the misuse of present cheque by Rajeev and Ashok in collusion with each other. He never met Rajeev before appearing the present case and he never had any transaction with Rajeev. He denied the execution of agreement and his signatures on Ex C2. He further denied the attestation of the agreement by a notary and purchasing of stamp paper on 08.01.2016. He alleged that the aforesaid documents

have been forged by complainant. The witnesses on the said agreement are not known to him. At the end, he stated that he has been falsely involved in this case by Ashok and Rajeev. In the cross-examination, he denied his signatures on the agreement Ex C2. It is stated that he was doing the business of property and also an agriculturist. He was having an office in Sohna and he closed his bank account Ex C1 in the lockdown. Ashok Kumar was his friend and he never initiated any proceedings against him. There was no writing executed between him and Ashok regarding the loan and issuing the security cheque or the refund of the loan amount. He never communicated in writing to Ashok Kumar to return his security cheque. He never filed complaint against Rajeev. All other suggestions were denied by this witness. Accused closed his evidence writing his separate statement of even date.

8) I have heard learned counsel for both the parties and have gone through case file very carefully.

9) Learned counsel for complainant has argued that the accused has given a cheque to complainant in discharge of his legally enforceable liability and the same was dishonoured vide separate memo of the bank with the remarks of “funds insufficient” and in-spite of receiving of legal notice, accused has failed to make the payment of the amount. Accordingly, he exposed herself to the liability for offence punishable under section 138 of the Act. He refereed to the agreement Ex C2 to argue

that the taking of loan is proved on record. It is submitted that the defence taken by accused has not been proved as signatures on the agreement are denied by accused but not proved on record. It is argued that neither Ashok has been examined nor any complaint has been filed against him by accused. It is also argued that the onus of proving the fact is on the person who asserts the same and therefore, it was accused who had to prove that the agreement Ex C2 does not bear his signatures. Learned complainant counsel has prayed for conviction of accused.

10) On the contrary, learned defence counsel has referred to the cross-examination of complainant to argue that friendly relations between the parties are not proved. It is argued that the accused was not acquainted with complaint and he never had any transaction with him. It is submitted that a blank signed cheque was given to Ashok as security against the loan of Rs. 1,50,000/- taken by accused, which has been misused and therefore the accused has no legal liability. It is contended that accused has never received the legal notice and even after refund of the amount of Ashok, he did not return the cheque. He further submitted that this is not believable that with an acquaintance of only one month, complainant gave Rs. 6 lac to the accused as friendly loan. He also argued that if Ashok was a common friend and was present at the time of agreement, why he was not made a witness and not examined in the Court. He further contended that neither the stamp vendor nor the notary

public have been examined by complainant. Therefore, the version of complainant is not proved on record. He has prayed for acquittal of accused.

11) I have heard rival contentions of both the sides.

12) Before moving further, it is important to mention that for the offence under Section 138 of NI Act, following ingredients must be duly established:

i) Accused issued a cheque, drawn on an account maintained by him.

ii) Such cheque must have been drawn for discharge, in whole or in part of any legally enforceable debt or other liability.

iii) The cheque has been presented to the Bank within a period of 3 months from the date on which it is drawn or within the period of its validity, whichever is earlier.

iv)The cheque is returned by Bank unpaid from that account.

v) The payee or the holder in due course of the cheque, makes a demand for the payment of the said amount by giving a notice in writing to the drawer of the cheque, within 30 days of the receipt of information by him from the Bank regarding the return of cheque as unpaid.

vi) The drawer of such cheque fails to make payment of the said amount to the payee or holder in due course, within 15 days of the receipt of said notice.

13) There is no dispute in this case that the cheque in question was drawn by accused and the same bears his signatures, which was presented for encashment within its validity period and the same was dishonored on its presentation. The complainant has fulfilled all the ingredients as mentioned above to get the presumption in his favour. So, it is to be seen whether the accused has been able to rebut the said statutory presumption against him or not.

14) For this purpose, it is settled law that the accused has to prove by leading cogent evidence that there was no debt or liability. In **Trilochan Singh Vs. Wassan Singh and another 2012(3) RCR Civil 582**, it has been held by the Hon'ble Punjab and Haryana High Court that when cheque in question was duly signed, then it will be presumed that it was issued for consideration and in discharge of legally enforceable liability and onus lies upon the accused to prove the contrary. In the present case, accused has admitted the issuance of cheque in question and admitted the signatures thereon. Therefore, the initial burden of complainant shifts upon the accused.

15) It is settled principle of law that the presumption under Section 139 of the Act is in favour of the complainant but the said presumption is rebuttable in nature and it makes a prima facie case for the complainant. To rebut the presumption, the accused is not supposed to disprove the case of the complainant beyond reasonable doubt, rather he is only to lead probable defence. For this, he can either lead direct evidence, circumstantial evidence or even can rely upon the case of the complainant and may point out the contradiction.

16) The complainant, in the present case, has duly established the ingredients to raise presumption under Section 139 of the NI Act. Accused has admitted his signatures on the cheque in question and also admitted that the same was drawn from his account. Learned defence counsel has argued that the accused never received any legal notice at his residential address as alleged by the complainant but I do not find any merit in the aforesaid contention as while dealing with issue of service in cases of 138 of the Act **Hon'ble Supreme Court in C C Alavi Haji Vs. Palapetty Muhammed 2007 (3) RCR (Crl) 185** held as under :-

> *"14. Section 27 gives rise to a presumption that service of notice been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed"or"addressee not in station", due service has to be presumed. [Vide Jagdish Singh v. Natthu Singh, AIR 1992 Supreme Court 1604; State of M.P. v. Hiralal & Ors., (1996)7 SCC 523 and V. Raja Kumari Vs. P.Subbaram a Naidu & Anr. 2004(4) RCR(Criminal) 933 :2005(1) Apex Criminal 58 : (2004)8 SCC 774]. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."*

17) Therefore as per the law discussed above, I am of the

opinion that the legal notice issued by the complainant was duly served upon the accused as per the postal receipt placed on file as Ex. C6. Moreover, this is not a case of accused that legal notice was sent at the wrong address and there is no document on record by accused that he was a resident of some other address and on the notice of accusation, plea of defence, bail bonds and the power of attorney, the same address is mentioned and there was no objection at that time by accused. The complainant has completed the basic ingredients of section 138 of the Act therefore, now it was the accused who had to give a reasonable defence to rebut the presumption established by complainant.

18) It is essential that the addressee should produce some material on record which could make it at least probable as to why notice was not served upon her. A bare statement, unaccompanied by any kind of evidence, would not rebut the presumption of service of legal notice. Leaving this aspect aside, it must be pointed out that the defence of non-service of legal notice can be availed by the accused only in those cases where accused was always ready and willing to make the payment of the cheque amount but for the non-receipt of any information of its dishonouring. The purpose of issuance of legal notice is to afford an opportunity to the drawer of the cheque to make the payment of the amount of the dishonoured cheque to the payee. Even if, accused does not receive any notice, he can validly make the payment within a period of 15

days of the receipt of summons from the Court where the case has been filed. It is further important to mention that after summoning, accused was served with the notice at his address but he did not appear and accordingly, warrants and proclamation were issued against him on the same address on which, the legal notice was issued. At this stage, accused appeared and applied for bail also. Therefore, it cannot be said that on the same address, legal notice was not issued to the accused. In light of this, it becomes clear that accused in this case failed to rebut the presumption of service.

19) To prove his case, complainant has produced the original cheque and one other document i.e. an agreement Ex.C2, which has been duly attested by the notary public and is signed by both the parties along-with the signatures of two witnesses. Although, the attesting witnesses have not been examined by complainant but accused has not been able to rebut the said document. Since, accused has denied his signatures over the said agreement Ex.C2 but has failed to produce any sufficient and material evidence in this regard. Merely denying the signatures is not sufficient to prove the contention. Accused has not examined any finger print and hand-writing expert who could be the best witness to submit the report with regard to the signatures on the said document. When accused could not prove the said fact, it is deemed to be taken that the document was executed in proper process.

20) As per the said agreement, accused has specifically admitted the taking of loan to the amount of Rs. 6 lacs from the complainant and issuance of the cheque in question in lieu of the said loan. It also cannot be avoided that the attesting witnesses or notary or the stamp vendor etc. have not been examined by accused to prove the fact that the said document does not bear the signatures of accused. Hence, complainant has duly established the ingredients in his favour with the proof of document Ex.C2 and the admitted signatures of accused on the cheque in question. Now, it is the accused, who has to prove a probable defence.

21) The first place where the accused could have shown the probable defence was the reply of legal notice but in the present case, even after receiving the legal notice, he did not reply the same and has thereby failed to put up his initial defence. The second place where the accused could have taken up his defence was his plea of defence, where he has admitted his signatures on the cheque in question along-with the fact that the same was drawn from his bank account.

22) In the plea of defence as well as in the cross-examination of complainant by way of suggestions, it is alleged that the cheque in question was given as a blank signed cheque as a security to one Ashok Kumar from whom, the accused obtained a loan of Rs. 1,50,000/- but he did not return the cheque even after repayment of loan.

Accused has denied any acquaintance and transaction with the complainant and has specifically denied his signatures on the document Ex.C2, which is an agreement duly signed by accused. With regard to the loan taken from Ashok Kumar, there is no evidence on record except the self serving statement of accused. Accused has failed to furnish any details of the said loan regarding the time, date, month or year of taking or returning of the said loan from Ashok Kumar. No other particulars have been brought on record to prove the fact that there was any such loan transaction between accused and Ashok Kumar. Moreover, there is no writing executed by accused at the time of taking or paying back the loan to Ashok Kumar. Accused himself has admitted that he was doing the business of property dealing and therefore, it is expected from an educated businessman that he would do the paper formalities before borrowing or repaying any loan but nothing such has been done by accused.

23) Accused has pleaded that the security cheque given to Ashok Kumar has been misused by him in connivance with the present complainant. However, when the accused has failed to prove the very fact that he was having any laon transaction with Ashok Kumar, there is no question of any collusion. Accused has failed to establish on record as to how the cheque in question came into the possession of complainant when he could not establish any relation with Ashok Kumar.

24) Ld. Counsel for accused has taken up a defence that the

security cheque given by accused to Ashok Kumar has been misused by complainant and Ashok Kumar, however, it was expected from the accused to make a complaint to the police or any other appropriate authority but surprisingly, accused kept silent and waited for the present complaint to be filed against him. The accused could have informed his banker also regarding the fact that his blank signed cheque may be misused but nothing such has been done by the accused which is not expected from a prudent man. So, the defence of misuse of cheque is not worthy of credence as despite being in knowledge, accused never shown any efforts to issue a legal notice to complainant for returning a cheque. The failure to set the criminal law in motion by intimation to the concerned authorities itself speaks of the ingenuine claim of accused. A mere bald assertion of misuse of cheque is not sufficient. Therefore, the accused has failed to prove his defence.

25) Accused has further pleaded that the document Ex.C2 has been forged by the complainant, however, it is again to be mentioned that mere alleging a fact does not prove the same. Accused has not brought on record any material in this regard. No such circumstance has been shown by accused as to how the said document was forged by the complainant. Furthermore, it was not expected from the accused that he would sit silent and would not make any communication with Ashok Kumar for getting his security cheque back after payment of the alleged

loan.

26) Burden of proving the consideration for dishonour of cheque is not on the complainant but the burden prove that a cheque had not been issued for discharge of legally enforceable liability is on accused and if he fails to discharge such burden he is liable to be convicted. In this case, this Court is of the view that accused has failed to prove any probable defence and he also failed to point out any contradiction in the case of complainant and consequently complainant is successful in proving the fact that in order to discharge pre-existing liability, the accused issued a cheque in question which was dishonoured and accused failed to make the payment despite the service of notice hence the **accused, Manoj Kumar** is hereby held guilty for the commission of offence punishable under Section 138 of Act. Let, the accused be heard on quantum of sentence on 14.11.2024.

Pronounced in open Court: **(Sonia),**
Dated: 12.11.2024. **Judicial Magistrate Ist Class,**
Gurugram/UID NO.HR0447

Note: This judgment contains 15 pages and all the pages have been checked and signed by me.

Dated:12.11.2024. **(Sonia)**
Judicial Magistrate Ist Class,
Gurugram/UID NO.HR0447

Typed by: Chanchal, Stenographer Gr-II.

(Sonia)
JMFC, Gurugram
UID No. HR-0447
12.11.2024