

**IN THE HON'BLE COURT OF MS SAMIKSHA GUPTA, MM-02 NI ACT (SED),
SAKET COURT, NEW DELHI.**

Complaint Case No. 630690/16

In the matter of:

Rukmani Devi,

W/o Sh. Satya Dev Tyagi,

R/o H. No. 136, Tyagi Mohalla, Dena Bank Wali Gali,
Chattarpur, New Delhi.

....Complainant.

Vs

Dharamvir

S/o Sh. Ramchander Tyagi,

R/o Luxman Vihar Phase I, 1383/31,

Main Railway Road, Opp. Apna Enclave,

Tyagi Building Material, Gurgaon, Haryana.

.....Accused.

Date of Institution : 07.05.2007

Date of Reserving Judgment / Order : 07.10.2016

Date of Pronouncement of Judgment/ Order : 25.10.2016

CASE OF THE COMPLAINANT

1. It is the case of the complainant that his grandmother Smt. Rukmani Devi was co-sharer in a joint property. The accused sold the joint property including the share of the complainant without consent of the complainant on the basis of forged and fabricated documents and after fabricating the

signature of the complainant. Thereafter, due to intervention of respectable persons of the society, an oral settlement was arrived at between the parties. Sh. Balbir Singh S/o Sh. Roop Chand was a witness to this settlement. The accused agreed to pay a sum of Rs.10,00,000/- in pursuance of the aforesaid settlement. The accused paid Rs.5,00,000/- in cash to the complainant. To discharge the remaining liability of Rs.5,00,000/-, the accused issued one cheque bearing no. 675771 dated 25.11.2006 for RS.5,00,000/- drawn on UCO Bank. When the aforesaid cheque was presented for encashment, several times the same was returned unpaid with the remarks "Insufficient Funds" vide memo last dated 20.03.2007. The complainant then issued a legal notice dated 30.03.2007 to the accused under Section 138 Negotiable Instruments Act ("NI Act" hereinafter) calling upon him to make the payment within 15 days of receipt of notice. On failure of accused to pay the cheque amount within the statutory period, the present complaint under Section 138 NI Act was filed.

DEFENCE OF THE ACCUSED

2. Accused was summoned by the Learned Predecessor vide summoning order dated 07.06.2007 and he was put to notice under Section 251 Cr.P.C on 23.07.2011 to which he pleaded not guilty and claimed trial by disclosing the following defence:

"I have already paid the cheque amount to the complainant. Infact the same was paid after three months of issuance of cheque. I went to the house of complainant for payment and asked the complainant to return the cheque but the complainant looked for about half an hour but could not locate the cheque as she has eyesight

problem. She told me that she would return the cheque to me after the same was found. Instead she filed the present complaint. I have not liability towards the complainant. The complainant is my sister in relation."

3. Due opportunity was granted to the accused to prove his above defence. The complainant was duly cross examined by the learned counsel for the accused. The accused further examined himself in his defence and closed his evidence. Thereafter, the matter was listed for arguments.

BRIEF REASONS FOR THE JUDGMENT

4. Arguments were addressed at length by counsels for the parties. I have heard learned counsels for the parties and perused the record. Ld. Counsel for the complainant has contended that all the ingredients of Section 138 NI Act have been proved and therefore the accused must be convicted U/s 138 NI Act.
5. Ld. Counsel for the accused has contended that offence under Section 138 NI Act is not made out. He has contended that there is no proof of the settlement between parties and as per the version of complainant, the said settlement was oral. Even Balbir who was admittedly the witness to the settlement has not been examined. The power of attorney dated 01.05.2007 is also improper and has not been proved as per law. There is no averment that the executant Smt. Rukmani Devi read and verified the same. Only the complainant is the Legal Representative who is pursuing proxy litigation on behalf of the complainant and other Legal Representatives have not been

joined. The earlier civil litigation regarding the same property was withdrawn by the complainant (plaintiff in that case) herself before the Gurgaon Court. There is no liability of the accused towards the complainant and therefore the accused should be acquitted.

6. Before advertng to the facts of the instant complaint, It is pertinent to reproduce Section 118(a) and 139 of the NI Act Section 118 (a) reads as:-

“Until the contrary is proved, the following presumptions shall be made:—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.”

Further, Section 139 reads as under:

“ It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, or any debt or other liability.”

As per Section 118 (a) of the Act, there is presumption in favour of complainant that the instrument i.e. cheque in dispute is issued for a consideration and further under Section 139 of the Act it shall be presumed, unless the contrary is proved that the holder of the cheque received the cheque for discharge, in whole or in part, or any debt or other liability.”

However, the said presumption is a rebuttable one. The accused is only required to raise a probable defence to rebut the above presumption by leading evidence or by bringing such facts on record in the cross examination of the complainant that could make the case of the complainant improbable. Further, the standard of proof has been held to be preponderance of probabilities which can be drawn not only from the materials which have been placed on record but also by reference to the circumstances on which the accused relies.

7. This Court is of the considered view that the accused Dharamvir has been able to rebut the presumptions in favour of complainant by raising a probable defence on the following grounds:

(i) The complainant has not appeared in court for her deposition and has not been cross examined also. Her grandson (CW1 Sh. Amresh) has deposed on her behalf and therefore it becomes essential to ascertain the admissibility and relevance of his deposition. The aforesaid SPA has deposed as a witness regarding the transaction with the accused and the liability of the accused. The scope of the authority of power of attorney was discussed by the Hon'ble Apex Court in *A C Narayanan Vs State of Maharashtra* (Crl. Appeal No. 73/2007, date of judgment 13.09.2013). The Hon'ble Supreme Court reaffirmed the judgments in *Shambhu Dutt Shashtri Vs State of Rajasthan* and *Janki Vasudev Bhojwani Vs Indusind Bank Ltd.* It was observed that “...no one can delegate the power to appear in the witness box on behalf of himself. To appear in the witness box is altogether a different act. A general power of attorney holder cannot be allowed to

appear as a witness on behalf of the plaintiff in the capacity of the plaintiff...". It was further held in A C Naraynan (supra) that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 NI Act. An exception to the above is when the power of attorney holder of the complainant does not have personal knowledge about the transactions in which case he cannot be examined. However, where the SPA alone is personally aware of the transaction there is no reason why he cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the POA holder about the transaction in question must be specified in the complaint. Further, in the case of *Shambhu Dutt Shashtri Vs State of Rajasthan* it was held that general power of attorney holder can appear, plead and act on behalf of the party but he can not become a witness on his behalf. He can only appear in his own capacity.

In light of the above judgments, analysis of the affidavit in pre-summoning filed by CW1 Sh. Amresh and his deposition during cross examination shows that he was not personally involved in any of the transactions as alleged in the complaint. The affidavit merely states that "*.../ am well conversant with the facts and circumstances the case...".* The cross examination of CW1 nowhere reflects that he had any personal knowledge about the transaction. In fact he has admitted that in the civil litigation pertaining to the property in question, he never attended any of the hearings at Gurgaon Court and the complainant Smt. Rukmani used to attend the said hearings. Further, the amount of Rs.5,00,000/- was given in cash by the accused to Smt. Rukmani and not to him. He has merely denied the

suggestion that the SPA is a forged document. In terms of the aforesaid precedents, it was incumbent on the SPA of complainant to aver and prove that he has personal knowledge about the transaction. The same has neither been averred nor proved from the evidence brought on record.

(ii) Even otherwise, this court is of the view that the accused Dharamvir has raised a probable defence and has been able to rebut the presumption in favour of complainant. Defence of the accused is that the settlement was not in presence of elders but in the court pursuant to which Rs.5,00,000/- in cash was paid to the complainant after three months. The cheque for Rs.5,00,000/- issued earlier was demanded back but the complainant said that she could not trace the same. The civil litigation was also dismissed as withdrawn on the ground that the same was filed by the plaintiff under a mistaken impression as is evident from the certified copy of statement Ex. DW1/A. The same has been reasserted by the accused during his evidence and nothing prejudicial to his defence has been elicited during his cross examination. Thus, the accused has raised a probable defence which has created reasonable doubt about the existence of legally enforceable debt or liability in favour of the complainant.

8. In view of the above discussion and on the basis of shortcomings in the complainant's version including the very lack of authority of SPA to file the present complaint, this court is of the view that the accused has been able to raise a probable defence that the impugned cheque was not given for the discharge of any legally enforceable liability. Consequently, accused

Dharamvir is acquitted of the offence under Section 138, NI Act.

**Announced in open court on
25.10.2016**

**(Samiksha Gupta)
MM(NI-Act 02), South East, Saket**