

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

**Decided on: 09.01.2018**

**1. CRM-A Nos.1285-MA of 2014 (O&M)**

Bhawna Kathuria

....Appellant

Versus

M/s Shivani Traders and another

....Respondents

**2. CRM-A Nos.1259-MA of 2014 (O&M)**

Bhawna Kathuria

....Appellant

Versus

M/s Shivani Traders and another

....Respondents

**CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN**

**Present :** Mr. Mukesh Rao, Advocate  
for the appellant.

Mr. Gaurav Singla, Advocate  
for the respondents.

**ARVIND SINGH SANGWAN, J.**

By way of this common order, I intend to dispose of the two present appeals i.e. CRM-A Nos.1285-MA and 1259-MA of 2014 as the complainant and the accused persons are same in both the cases and the trial Court has decided both the cases on the same date vide impugned judgment dated 04.06.2014 while acquitting the respondents/accused.

**1. CRM-A No.1285-MA of 2014**

Brief facts of the case are that the appellant/complainant filed the criminal complaint No.51 dated 15.09.2011 (hereinafter to be referred as 'first complaint') against the respondents/accused with the allegations that the appellant and the respondents have friendly relations and the respondent – Shivani Jain along with her husband – Manoj Jain, on 20.04.2011 obtained a friendly loan of Rs.10,00,000/- (ten lacs rupees) for a period of 06 months with a promise to return the same by 20.10.2011 as she required the same for her business. The complainant advanced the loan and accused/respondent No.2 issued a post-dated cheque No.864442 dated 20.10.2011 for an amount of Rs.10,00,000/- (ten lacs rupees) drawn on UCO Bank, Thomson Press, Delhi Mathura Road, Faridabad. It is further stated in the complaint that again on 15.05.2011, accused and her husband – Manoj Jain approached the complainant that they can help her in obtaining a loan of Rs.30,00,000/- from a bank within a period of 01 month as the complainant wanted to purchase a big house and demanded that they will charge 5% as their commission. Thereafter, on 10.06.2011, accused No.2 – Shivani Jain and her husband approached the complainant to pay them another amount of Rs.10,00,000/-(ten lacs rupees) for a period of 45 days and the complainant provided the amount and the accused persons issued 02 cheques bearing Nos.864411 dated 22.07.2011 and 864412 dated 25.07.2011 for an amount of Rs.5,00,000/- each (five lacs rupees each) drawn in UCO Bank, Thomson Press, Delhi Mathura Road, Faridabad. Apart from this

accused also took Rs.50,000/- in cash as part payment of commission for providing the loan for an amount of Rs.30,00,000/-.

The complainant later on, requested the accused to refund the loan and on the due date of the cheques, she presented cheque Nos.864411 as well as 864412 which were returned by the Bank vide memos dated 25.07.2011 and 27.07.2011 with the remarks 'insufficient funds'. It is further stated in the complaint that the complainant, thereafter, issued a legal notice dated 19.08.2011 and the same was replied by the accused persons and the factum of loan was denied and the accused set up a defence that in fact, the cheques were issued by them as husband of the complainant was serving in Government Polytechnic for Women, Faridabad and he had promised to provide a job to accused No.2 – Shivani Jain and the bank cheques were issued so that the payment be made to the concerned persons. With these allegations, the aforesaid complaint was filed.

## **2. CRM-A No.1259-MA of 2014**

The complainant also filed the criminal complaint No.1738 dated 06.12.2011 (hereinafter to be referred as 'second complaint') with the allegations (in addition to aforesaid facts in first complaint) that cheque No.864442 dated 20.10.2011 was presented in the bank and the same was also dishonoured on 22.10.2011 by the bank by issuing a memo with the remarks 'insufficient funds'. Thereafter, the complainant issued a legal notice dated 12.11.2011 stating all the facts in which a reply was filed by the accused persons on the same line that the cheques were issued in order to procure a job for accused No.2 – Shivani Jain as

promised by husband of the complainant who was serving in Government Polytechnic for Women, Faridabad.

Both the complaints were tried by the same Court and vide separate judgments dated 04.06.2014, both the complaints were dismissed by the trial Court. Thereafter, the aforesaid present 02 appeals have been filed and notice of motion was issued on 06.10.2015 and lower Court record was also requisitioned.

Counsel for the appellant has assailed the findings of the trial Court on the grounds that as per the agreement Ex.C8 produced on record in criminal complaint No.1738, it is proved that it was agreed between the parties that the accused No.2 has obtained a friendly loan of Rs.10,00,000/- and cheque No.864442 dated 20.10.2011 was issued by accused No.2. Counsel for the appellant has further submitted that the appellant has proved the advancement of loan by producing the sale deed vide which the complainant has sold her house No.1131, Sector 7-C, Faridabad to one Smt. Kamala Devi wife of Dharampal Yadav for Rs.4,42,000/- (Four lac forty-two thousand rupees). It is further submitted that the remaining amount was paid in cash, after obtaining the same from the mother of the complainant and it is, thus, proved on record that the appellant/complainant has advanced the friendly loan of Rs.10,00,000/- on 20.04.2011 and again, another amount of Rs.10,00,000/- in the month of July, 2011 against which the accused No.2 had issued 03 cheques i.e. cheque No.864442 dated 20.10.2011 for an amount of Rs.10,00,000/-, cheque No.864411 dated 22.07.2011 for an amount of Rs.5,00,000/- and cheque No.864412 dated

25.07.2011 for an amount of Rs.5,00,000/-. Counsel for the appellant has further argued that the trial Court has wrongly held that the accused have been able to discharge the presumption by way of leading defence evidence.

Counsel for the appellant has further submitted that the trial Court has relied upon judgment of the Hon'ble Supreme Court **“Krishna Janardhan Bhat vs Dattatraya G. Hegde”, 2008(1) RCR (Criminal) 695** to hold that since the appellant has failed to prove that she had the financial capacity to advance the loan, the accused is liable to be acquitted. Counsel for the appellant has relied upon **“Rangappa vs Mohan”, 2010(3) RCR (Criminal) 164**, wherein the Hon'ble Supreme Court has distinguished the judgment passed in **Krishna Janardhan Bhat's case (supra)**. The operative part of the said judgment is reproduced as under:-

*“14. In light of these extracts, we are in agreement with the respondent- claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in **Krishna Janardhan Bhat (supra)** may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus*

*clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."*

It is further submitted on behalf of the appellant that the complainant by way of an agreement Ex.C8 has admitted the advancement of the loan and this agreement was duly proved from the

statement of CW2 – Rahul, who is an attesting witness.

Counsel for the appellant has further argued that the complainant has set up a very weak defence that the cheques were issued for procuring a job for accused No.2 by husband of the complainant in YMCA, Faridabad as he was working in Government Polytechnic College, Faridabad. It is, thus, submitted that it is proved on record that the cheques in questions were issued in discharge of an existing debt or liability and, therefore, the trial Court should have drawn a presumption under Section 139 of the Negotiable Instruments Act (in short 'N.I. Act') in favour of the complainants as all the ingredients of Section 138 of the N.I. Act have been proved.

In reply, counsel for the respondents has submitted that the complainant, on 04 occasions did not set up the agreement dated 20.04.2011, Ex.C8 and the same has been prepared later on. It is further submitted by counsel for the respondents/accused that when the first legal notice was issued, regarding dishonour of 02 cheques i.e. cheques No.864411 and 864412 which is produced on record as Ex.C5, there is no mention of this agreement dated 20.04.2011 (Ex.C8). Counsel for the respondents has further submitted that again, when the complaint in this case was filed, there is no mention of the said agreement and even in the affidavit filed by the complainant dated 15.09.2011 along with criminal complaint No.51 dated 15.09.2011, there is no mention of this agreement dated 20.04.2011.

Counsel for the respondents/accused has further argued that even when the 3<sup>rd</sup> cheque i.e. cheque No.864442 was dishonoured,

a similar legal notice was issued which is produced on record as Ex.C3 in criminal complaint No.1738 dated 06.12.2011 and there is no mention of this agreement dated 20.04.2011 though, later on, the same has been produced as Ex.C8 in this complaint. It is also submitted that neither in the complaint filed in the Court nor in the affidavit filed by the complainant dated 06.12.2011, this document was set up by the complainant and, therefore, just by producing the same during the course of evidence as Ex.C8, the trial Court has rightly discarded the same by observing that the same appears to be prepared after filing of the complaint.

Counsel for the respondents/accused has referred to the statement of CW2 – Rahul Kathuria who is an attesting witness to this document Ex.C8 where he has stated that on the document Ex.C8, neither his name is mentioned as a witness nor his father's name or address is given. He has further stated that the complainant is his sister-in-law in relation and in his all government record his name is Rahul Kumar whereas on Ex.C8 his signatures are as Rahul Kathuria. He further stated that as per cross-examination of this witness, Ex.C8 was not typed in his presence and he had signed the same, in the evening at about 05:00 to 06:00 PM and, therefore, it is stated that this witness i.e. CW2 is highly interested and could not prove the ingredients of the agreement which was neither written nor executed in his presence.

Counsel for the respondents/accused has further submitted that the complainant has failed to prove that she had cash money available with her firstly on 20.04.2011 when an amount of

Rs.10,00,000/- was advanced as a loan and even in July, 2011 when another cash amount of Rs.10,00,000/- was paid. Counsel for the respondents/accused has referred to the sale deed Ex.DB vide which the complainant has sold her house for Rs.4,42,000/- whereas as per allegation in the complaint she has sold the same for Rs.12,00,000/- which is factually incorrect statement. It is further submitted that the complainant's own case as CW1 is not proved that she obtained the remaining amount from her mother as her mother was never examined as a witness in support, thereof. Counsel for the respondents/accused has further referred to cross-examination of the complainant – CW1, where she has stated that she had PAN Card and ITRs but these documents were never produced on record to prove that any amount was paid or reflected in her ITRs.

It is further argued on behalf of the respondents/accused that as per the legal notice as well as in the complaint, it is set up by the complainant that they had given complaints to the police authorities with regard to payment of Rs.50,000/- as commission for obtaining a loan from the bank and for not returning the original documents, etc. However, no such complaint has been summoned or produced on record nor any official from the concerned police station has been produced as a witness to prove that the complainant ever lodged any such complaint.

Lastly, it is argued on behalf of the respondents that by producing 02 witnesses i.e. Sudeep Kumar as DW1 and Bishan Lal Rana as DW2 who produced on record the application form Ex.DW2/A

and Provisional Letter Exs.DW2/B and DW2/C, the accused has proved on record that on 21.04.2011, the accused No.2 appeared in a test for seeking employment in the Government Polytechnic College, Faridabad where the husband of the complainant was employed and thus, the 03 disputed blank cheques were issued as a security to be used for procuring a job for accused No.2 and, in fact, the complainant has not advanced any loan to the accused persons and, thus, the trial Court has rightly held that the ingredients of Section 138 of the N.I. Act are not proved.

After hearing counsel for the parties, I find no merit in both the appeals for the following reasons:-

*a). The agreement dated 20.04.2011 Ex.C8 was never set up by the complainant in the first legal notice dated 19.08.2011 issued qua 02 cheques No.864411 and 864412. Even in the first complaint No.51 dated 15.09.2011, there is no reference to this document Ex.C8. In the supporting affidavit dated 15.09.2011 also the complainant has not made any mention of this agreement. Not only this, when the complainant issued the second legal notice dated 12.11.2011 with regard to the another cheque No.864442 again, there was no reference to this agreement (Ex.C8). Even in the second complaint and the supporting affidavit dated 06.12.2011, there is no mention of this agreement, therefore, this agreement (Ex.C8) appears to have been prepared later on by the complainant as rightly held by the trial Court.*

*b). Looking from another angle, this document Ex.C8 i.e. agreement dated 20.04.2011 is not proved on record, in accordance with law as the attesting witness i.e. CW2 – Rahul Kumar @ Rahul Kathuria, in his cross-*

*examination has admitted that this agreement was already typed and he has signed the same in the evening and, therefore, this witness has failed to depose that this agreement was either executed in his presence or after reading/admitting the contents of the same, accused No.2 had signed the agreement in his presence and, therefore, the requirements of Section 68 of the Evidence Act is not fulfilled and this document is not proved on record.*

*c). The complainant could only proved that she was in possession of an amount of Rs.4,42,000/- which she has received vide sale deed dated 18.05.2010 Ex.DX and there is no evidence on record to prove that she could make the payment of the balance amount, though, in the notice and the complaint she stated that by way of sale deed, she sold her house for Rs.12,00,000/- which is factually incorrect. So far as the allegations that she made the arrangements for the remaining amount by obtaining the balance from her mother, there is no evidence especially when she has failed to produce her mother or any other family member to depose that they have paid this balance amount to the complainant and, therefore, the payment of Rs.20,00,000/- as friendly loan is not proved on record.*

*d). The complainant could not prove that when the loan of Rs.10,00,000/- was advanced for the second time in the month of July, 2011, there was any agreement between the parties to this effect.*

*e). As per the version given by the complainant, the accused and her husband assured her that they will arrange the loan for the complainant from a bank for an amount of Rs.30,00,000/- and she had paid the amount of Rs.50,000/- as commission for arranging the bank loan. Though, the complainant has stated in the legal notice as well as in the complaint that she has prepared the*

*documents and submitted the relevant record to the accused persons but she could not produce any document on record that she ever applied for loan with the bank.*

*f). Even the complainant could not prove her version that she has approached the police authorities when the accused persons could not arrange the loan for her or that they have not returned the original documents to her and have obtained Rs.50,000/- as commission. Neither any complaint was produced on record nor any witness from any concerned police station was examined to prove that any complaint was ever made.*

*g). The accused No.1 is M/s Shivani Traders and the cheque has been issued by accused No.2 as a Proprietor of M/s. Shivani Traders. The complainant could not prove that there was any business dealings between the complainant and accused No.1 as it was stated that the loan was advanced by the complainant to accused No.2 as friendly loan.*

*h). The respondents/accused has set up a defence that accused – Shivani Jain has applied for the post of Data Entry Operator in Government Polytechnic College, Faridabad where husband of the complainant was serving and the accused on 21.04.2011 i.e. on the very next date of the issuance of the alleged cheque No.864442 appeared in a test as per the statement of DW1 – Sudeep Kumar and DW2 – Bishan Lal, who proved the provisional letter Ex.DW2/B. The complainant could not rebut the defence set up by the accused persons that the cheques were issued as a security for procuring a job to the accused, though, it was an illegal action on behalf of the accused, however, the same has some bearing with regard to the fact that the cheques were not issued in discharge of any legal debt or liability.*

*i). The arguments raised by counsel for the appellant*

*that the judgment of the Hon'ble Supreme Court in **Krishna Janardhan Bhat's case (supra)** has been distinguished by the Hon'ble Supreme Court in a subsequent judgment in **Rangappa's case (supra)**, in my opinion is distinguishable arguments. The Hon'ble Supreme Court in **Rangappa's case (supra)** has held that there is a presumption mandated under Section 138 of the N.I. Act which includes the existence of a legally enforceable debt or liability. In the light of judgment of the Hon'ble Supreme Court, the Court has to see whether the presumption under Sections 138 and 139 of the N.I. Act are rebutted by the accused persons or not in individual case.*

*j) In the present case, the respondent/accused has set up a defence by bringing evidence in her defence on record that she had given blank cheques to the complainant as a security for procuring a job and in view of the well settled principle of law that once the accused in his evidence is able to rebut the presumption under Sections 138 and 139 of the N.I. Act, on preponderance of evidence, it is for the complainant to prove its case beyond all reasonable doubts. In the instant case, the appellant/complainant could not rebut the reasonable defence taken up by the accused persons for the reasons stated hereinabove.*

In view of the above, I find no illegality in the impugned judgments dated 04.06.2014 passed by the trial Court holding that ingredients of Section 138 of the N.I. Act are not satisfied as the cheques in question was not issued by the accused in favour of the complainant in discharge of any existing debt or liability as the accused has been able to prove by leading defence evidence, which could not be

rebutted by the complainant that the cheques were not issued in discharge of any existing debt or legal liability.

Finding no illegality or infirmity in the judgment of the trial Court, both the present appeals are dismissed.

09.01.2018  
*yakub*

(ARVIND SINGH SANGWAN)  
JUDGE

|                           |        |
|---------------------------|--------|
| Whether speaking/reasoned | Yes/No |
| Whether reportable:       | Yes/No |