

IN THE COURT OF JUDGE SMALL CAUSES SRINAGAR

CNR No.JKSG030048582018

Case No. 116615/2018

Date of Institution. 20.09.2018

Date of Decision:28.06.2024

In the case of:

Mohammad Sidiq Beigh

S/o Late Mohammad Amin Beigh

R/o Devi Angan Hawal, Srinagar

.....Complainant

Through:Adv. Hakim Rais

V/s

Mohammad Ashraf Mir

S/o Ghulam Nabi Mir

R/o Hakripora Pulwama Kashmir

.....Accused

Through: Adv. Khalid Nazir Bandy

In the matter of:-Complaint under Section 138 read with Section 142 of Negotiable Instrument Act read with 420 of RPC.

Decision

Acquit

CORAM: Ms Tabasum (JO CODE: JK00173)

JUDGMENT

The instant complaint has been presented before this court for disposal

under law. In the complaint it has been stated that the accused person is a broker of immovable properties by profession, doing the said business with other three persons/ brokers namely 1. Abdul Wahid Khan S/o Abdul Qayoom Khan R/o Baghat-i- Barzulla Srinagar and 2. Mohammad Yousuf Malik S/o Mohammad Ramzan Malik R/o Nai Sarak Habbakadal A/P Natipora, Srinagar 3. Mohammad Maqbool Shah S/o Late Shamas-ud-din Shah R/o Pirbagh, Srinagar. The complainant expressed his desire to the accused person and his said associates for purchase of an immovable property subsequently the accused and his associates enticed, by way of hoodwink pretended themselves to be the authority holders of an immovable property comprising of double storeyed residential house along with the land underneath and appurtenant thereto measuring 01 kanal 05 marlas situated at Chinar Colony Baghati Barzulla, Srinagar actually belonging to a migrant Mst. Koshaliya widow of Jawahar Lal Rafiz, however the accused herein and his above said three associates assured the complainant that the said property is at their disposal, accordingly the sale price of the said property was agreed at Rs. 1.16 Crore (Rupees one crore sixteen lacs only) in total in between the complainant and accused person and his associates. The accused person identified the said property on spot to the complainant and his wife Mst Shafiqa and the complainant showed his willingness to purchase the said land and building and paid in full the said consideration amount to the accused person and his associates by the complainant and his wife which the complainant and his wife managed by way of sale of golden ornaments and by way of securing loan from the bank. However, the accused and his associates avoided the complainant for execution of sale deed and also avoided the complainant regarding delivery of possession of property in favour of the complainant. Thereafter, the accused and his associates played a trick to deceive the complainant for

their wrongful gains and to cause wrongful loss to the complainant, took the complainant and his wife to Jammu under the guise of execution of power of attorney with respect to said property through actual owner in favour of the complainant and his wife, subsequently documents of irrevocable General Power of Attorney and agreement to sell were executed at Jammu in favour of the complainant and a huge amount of Rs. 2.00 lac approx was incurred on stamps by the complainant himself but the same later on proved a fraud, thus a dispute arose and the complainant and his wife demanded back the money from the accused and his associates then the accused and his associate played another fraud and hoodwink demanded more amount to the tune of Rs. 40.00 lakhs (Rupees forty lacs) from the complainant for bringing the actual owners of the property for execution of Power of attorney etc., in favour of the complainant and the complainant was left with no option but to pay further amount of Rs. 40.00 lac to the accused and his associates in this way the accused and his associates received in total an amount of Rs. 1.80 crore (One crore and Eighty lacs) from the complainant besides wasted lakhs of rupees on stamps, air fare, boarding lodging etc at Jammu and Delhi. Finally when all the fraudulent tricks of the accused and his associates were exposed, the complainant and his wife demanded refund of their amount and one amongst culprits refunded just a petty amount of Rs. 5.00 lac to the complainant and the accused herein also issued and handed over seven cheques for an amount of Rs. 35.00 lacs in discharge of legally enforceable debt at the residence of the complainant at Devi Angan Hawal, Srinagar, the details of cheques are given as under:-

Cheque No.	Dated	Amount	Bank
820208	19-07-2018	5.00 lac	J&K Bank, B/U Ompora
820211	20-07-2018	5.00 lac	J&K Bank, B/U Ompora
820210	21-07-2018	5.00 lac	J&K Bank, B/U Ompora

820209	22-07-2018	5.00 lac	J&K Bank, B/U Ompora
820205	23-07-2018	5.00 lac	J&K Bank, B/U Ompora
820207	23-07-2018	5.00 lac	J&K Bank, B/U Ompora
820206	24-07-2018	5.00 lac	J&K Bank, B/U Ompora

and the complainant presented the said cheques for encashment with J&K Bank Ltd., B/U S.S.I Lal Chowk Srinagar, but the cheques were returned unpaid to the complainant by the bank with seven separate memos dated 24.07.2018 carrying remarks "FUNDS INSUFFICIENT". Thereafter, the complainant approached the accused and apprised him regarding the dishonor of cheques by the bank and asked for payment by cash but the same yielded no fruitful results and the accused jointly and severally cheated the complainant. It came abundantly clear that the accused person has deliberately, intentionally and willfully issued the cheques with ulterior motives and design, knowing fully well that the said cheques will not be honoured on presentation. The complainant consequently was constrained to serve a demand notice in the name of the accused person separately through his lawyer vide Ref. No. SAH-59 dated 20-08-2018 upon the accused person, under the provisions of 138 of Negotiable Instrument Act through registered post bringing to the knowledge of the accused person about the dishonor of the cheques by the bank on account of "funds insufficient" and informed the accused person to make the payment within the statutory period from the date of the said notice, However, despite the service of the said notice the accused person did not make the payment of the dishonored cheques to the complainant till date. The payment has not been made by the accused person with the ulterior reasons, who malafidely and intentionally issued the said cheques knowing that the same would be dishonored on presentation. The cause of action for purpose of filing the present complaint been arisen when the statutory period of notice expired with regard to the

dishonor of the cheques. The cheques were dishonored and the demand notice was served upon the accused person above named with the jurisdiction of this court.

This Court passed order dated 20.09.2018, whereby cognizance u/s 138 NI Act was taken by this court and notice was against accused.

The statement of the accused u/s 242 Cr.PC has been recorded on dated 29.07.2021. The various questions have been put to the accused.

Q. No.1. Whether you have issued seven number of cheques for an amount of Rs.35 lacs in favour of the complainant.?

Answer: The accused has admitted about issuance of cheques however, he has stated that the cheques have been issued for the purposes of security measure.

Q.No.2 whether you have issued cheque no.820211,820210,820209,820205,820207 dated 19-07-2018, 20-07-2018, 21-07-2018, 22-07-2018, 23-07-2018, 23-07-2018,24-07-2018 each amounting to Rs.5 lac.?

Answer: The cheques have been issued by the deponent in the year 2013 however as a purpose of security measure, same bears the signature of the deponent. The deponent submitted that the complainant has in his presence written the cheque amount and in the last sentence of the answer the deponent stated that complainant in absence of the deponent has written the amount himself.

Q. No.3. Whether the cheques bear your signature.?

Answer: The signature on the cheques is admitted by the deponent.

Q. No.4. Whether cheques belongs to your account.?

Answer: The deponent has admitted that the cheques belongs to his account.

Q. No.5. Whether you owe an amount of Rs.35 lacs towards the complainant.?

Answer: No as the cheques have been issued as a security purpose.

Q. No.6. Whether you wish to state something before the court.?

Answer: Basically one deal entered between some persons namely Ab Wahid Khan, Mohd Yousuf Malik, Mohd Maqbool Shah, and Mohammad Sidiq Beigh (complainant), with respect to one migrant property belonging to one lady namely Mst Koshaliya Devi. The deponent was an employee of Ab Wahid and in the year 2014, deponent was filing the land with soil on a commission basis where he was given 30 rupees per tipper for the same later on Mohammad Sidiq had direct dealing with Abdul Wahid Khan, Mohd Yousuf Malik. The deponent was sent by Mohd Sidiq to meet Koshaliya Devi and Mohd Yousuf was accompanying the deponent. The deponent came to know the property actually belonged to Koshaliya Devi however, some part of the money was outstanding, later on deponent alongwith Mohd Yousuf and son of Mohammad Sidiq went to meet Koshaliya at Delhi, accordingly an amount was deposited in the account of the deponent to the tune of Rs.35 lac and by way of online transaction the deponent sent this money of Rs.34 lac out of 35 lac in the account of Mohd Yousuf with a breakup of Rs.2 lac separately and Rs.32 lacs separately and an amount of Rs.80,000 was paid in presence of Bashir Ahmad Bhat at Pratap Park. Mushtaq Ahmad Bhat was also present on spot and Rs.20,000 was spent on return ticket on the saying of Mohammad Sidiq, accordingly I do not owe any amount towards the complainant. The deponent wish to

purchase the land at Humhama from Mohd Yousuf however, the deal could not finalized with respect to the same transaction Mohd Ashraf had paid an amount of Rs.25 las towards the Mohd Yousuf however, the amount was transferred back by Mohd Yousuf towards Mohd Ashraf on dated 23.8.2014.

The complainant was directed to lead evidence, the complainant produced the evidence on affidavit.

Four witnesses have appeared before the court.

CW-1 namely Mohd Sidiq Beigh S/o Late Mohammad Amin Beigh R/o Devin Angan Hawal Srinagar in examination in chief he has stated that the deponent was approached by Mohammad Maqbool Shah, who has friendly relations with the deponent, and introduced one Abdul Wahid Khan and accused to the deponent. The accused and said Abdul Wahid Khan claimed to be property dealers and they offered to sell an immovable property consisting of a double storied residential house along with land underneath and appurtenant thereto measuring 1 kanal 5 marlas situated at Chinar Colony Baghati Barzulla Srinagar. The deponent after visiting the said property agreed to purchase the same and in this regard a sale consideration amount was fixed at Rs 1.16 crores. Said property was owned by a Kashmiri Pandit lady namely Mst Koshaliya W/O Late Jawahir Lal Rafiz who presently resides at Jammu and the accused and said Abdul Wahid Khan claimed to have authority to sell the said property. The deponent managed the said amount of Rs 1.16 crores by selling the golden ornaments of his wife and by availing loans, paid the sale consideration amount of Rs 1.16 crores to the accused and said Abdul Wahid Khan who assured the deponent to execute the requisite documents and to deliver the possession of the said property. The accused and said Abdul Wahid Khan

failed to handover the possession of the said property to the deponent and further failed to handover any document to the deponent with respect to the said property. Thereafter, the accused and said Abdul Wahid took the deponent and his wife along with Mohammad Maqbool Shah to Jammu with an assurance that the formal power of attorney with respect to the said property shall be executed there in favour of deponent. Accordingly, the deponent spent a huge amount in order to Visit Jammu and a power of attorney and agreement to sell were executed over which the deponent paid huge stamp duty of Rs 2.00 lacs but unfortunately the said power of attorney was not registered by the reasons best known to the accused and his associate and by smelling some fraud, the deponent demanded his money back from the accused and his above named associate. In order to further deceive the deponent, the accused and said Abdul Wahid Khan played another fraud by demanding further amount of Rs 40.00 lacs from the deponent on mere excuse of escalation of market rates of the property and charged more amount over the already fixed consideration amount and reached total sale consideration amount of Rs 1.80 lacs out of which the deponent had paid an amount of Rs 1.40 lacs on mere excuse of escalation of market rates and despite that the accused and Abdul Wahid Khan failed to execute any document in favour of deponent. Thereafter, the accused personally approached the complainant and took whole responsibility of finalization of deal and registration of sale deed with respect to said property in favour of deponent for which the accused demanded extra amount of Rs 40.00 lacs over the already paid amount of Rs 1.40 crores and assured the deponent to bring the actual owner of the said property for execution and registration of formal transfer deed. The deponent had no alternative and thus he paid the amount of Rs 40.00 lacs to the accused through Bank Transfer. Finally said deal proved to be hoax as the accused

and his associate neither brought the real owner of the said property nor the said property was handed over to the deponent. Resultantly, the deponent along with his wife demanded his money back and in order to pay part amount of Rs 35.00 lacs, the accused issued seven cheques bearing cheque No 820208 dated 19/7/2018, 820211 dated 20/7/2018, 820210 dated 21/7/2018, 820209 dated 22/7/2018, 820205 dated 23/7/2018, 820207 dated 23/7/2018 and 820206 dated 24/7/2018 each amounting to Rs 5.00 lacs all payable at J&K Bank Branch Ompora Budgam. The deponent presented the said cheques in J&K Bank Branch SSI Lalchowk for payment, however the said cheques got dishonoured on the reasons 'Funds Insufficient and the concerned bank issued bouncing memos dated 24/7/2018 in favour of the deponent. The deponent thereafter approached the accused and his associate above named and conveyed him about the bouncing of the cheques and requested him to make the payment of cheques amount but the accused and his associate refused to do so which prompted the deponent to serve a demand notice upon the accused through Advocate Hakim Sajad Ahmad and the accused was asked to pay the cheques amount within a period of 15 days but the accused did not pay the same within the stipulated period of time.

In cross examination he has stated that the brokers shop does not bear any name/name plate. It is true that the jeweller to whom the deponent has sold the jewelry has not been cited as a witness neither he has placed on record any receipt with respect to sale of jewelry. It is true that the deponent has not placed on record any book of accounts or income tax details with the file. He has not cited any Chartered Accountant/any other person as witness who could state about the transaction. It is true that with respect to these persons namely Abdul Wahid, Mohd Yousuf, Mohd Ashraf, Mohd Sidiq there is no partnership deed which could have been placed on

record. It is true that the first deal took place with respect to this property between the deponent and Abdul Wahid. Abdul Wahid has not been framed as accused in the matter, crime branch has initiated some proceedings against Abdul Wahid, the deponent has not given any detail with respect to the initiation of proceedings in the Crime Branch against Abdul Wahid before the court. The deponent has met Koshaliya and the Koshaliya is known to the deponent because she is the neighbor of the complainant, however, where Koshaliya presently resides deponent has no information. The deponent has not met Koshaliya with respect to the instant deal. It is true that accused alongwith Mohd Yousuf went to Jammu with respect to the deal/transaction. It is true that because of the non-availability of Pan card and Adhaar card the money was sent to the account of the accused who in turn transferred this money in the account of Mohd Yousuf by virtue of demand draft, accordingly Mohd Yousuf made demand draft in the name of Koshaliya on dated 22.6.2014, since the amount was transferred however, the deponent obtained one blank cheque from the accused which did not bear the date.

Cw-2 namely Mohammad Maqbool Shah S/o Shamas ud din Shah R/o Nadirgund Hyderpora Srinagar has stated that the deponent is having good relations with the complainant and is well aware about the facts and circumstances of the case. The deponent introduced one Abdul Wahid Khan and accused to the complainant who are the property dealers as the complainant intended to purchase a residential house. The accused and said Abdul Wahid showed some properties to the complainant out of which one house situated at Chinar Colony Baghati Barzulla Srinagar was liked by the complainant and he agreed to purchase the same. The said Abdul Wahid Khan claimed to be the authorized person to sell the said

property and he presented some documents with respect to the said property which showed that the property in question belonged to one Kashmiri Pandit lady namely Mst Koshaliya. Accordingly, a sale consideration was fixed at the rate of Rs 1.16 crores with respect to the said property. The complainant availed loans and sold the golden ornaments of his wife to manage the said huge amount and paid the said amount of Rs 1.16 crores to the accused and said Abdul Wahid Khan. The accused and said Abdul Wahid Khan failed to execute any document in favour of complainant due to which the complainant demanded his money back but the accused and his associate took the complainant and his wife to Jammu in order to execute and register formal documents with respect to the said property and the complainant managed the tickets and other expenses and went to Jammu but the accused and said Abdul Wahid Khan failed to bring the owner of the property to execute and register the documents which compelled the complainant to demand back his money as he smelled some fraud. The deponent too went to Jammu with the parties and is witness to the whole episode. The accused and his accomplice Abdul Wahid Khan played another fraud for execution of documents on mere excuse of escalation of market rates of the property and charged more amount over the already fixed consideration amount and reached a total sale consideration amount of Rs 1.80 crores out of which the complainant had paid an amount of Rs 1.40 crores to the accused and said Abdul Wahid Khan, despite that no document was executed in favour of the complainant. Thereafter the accused took responsibility of executing the documents in favour of the complainant but demanded an additional amount of Rs 40.00 lacs from the complainant and assured him that they will bring the original owner of the property for documentation and the complainant had no choice but to give the said amount of Rs 40.00 lacs to the accused and complainant

transferred Rs 40.00 lacs in the account of accused. Despite receiving the further amount of Rs 40.00 lacs, the accused failed to execute any document in favour of complainant as a result of which the complainant demanded back his money from the accused and said Abdul Wahid Khan and accordingly for part payment the accused issued seven cheques in favour of the complainant in presence of the deponent each amounting to Rs 5.00 lacs. The said cheques were dishonoured on its presentation due to insufficiency funds and then the complainant issued a legal notice to the accused for making the payment of cheques amount but the accused did not make the payment to the complainant. The examination in chief has been written on my instructions and bears my signature. The contents are true and correct.

On cross examination he has stated that the property was situated at Bhaghat Barzulla. Mohd Sidiq has sold his property (jewellery) to his brother. Mohammad Sidiq also stated that he had taken 60 lacs as loan from the bank against mortgage of a shop in the year 2013. Deponent has no knowledge that Mohd Yousuf was broker with respect to the property of Koshaliya. He was being informed with respect to the property by Abdul Wahid. It is true that the deponent is a broker of property for Mohammad Sidiq. The deponent made it possible to have meeting between Mohd Ashraf and Abdul Wahid in the year 2013. He has no knowledge that Mohd Ashraf was actually doing the work of land filling. It is not true that Mohd Ashraf was employee of Abdul Ahad however, he was his partner there was no business transaction earlier in between Mohd Maqbool and Abdul Wahid. The deponent is supplier and works in private capacity. It is true that the agreement to sell was executed between the parties in the year 2013 and power of attorney was also executed and the documents are lying with the deponent. The deal was with respects to Bhaghat property for an amount of Rs.1 crore 80 lacs. The deponent was also present in the deal when the deal

was conducted between the complainant and the accused. When he went to Jammu regarding the execution of power of attorney he stayed in the hotel in the year 2013 alongwith Mohammad Sidiq in addition to this deal Mohd Sidiq has also purchased house no.20 situated at Bhaghat which actually belongs to one Pandit.

Cw-3 Hakeem Shabir Abbas S/o Ghulam Ahmad R/o Khanyar Hawal Branch Manager Srinagar has stated that he has joined the bank branch on 12.08.2021. Memo stands issued before his joining. The cheque bearing numbers 820211,820205,820208,820207,820206,820210,820209 have been presented in your bank on dated 24.7.2018. The signature and seal on the memo is of SSI bank branch Lalchowk. There was no cash in the account of the accused persons. The cheques were of the amount of Rs.35 lacs. There was no money lying in the account of the accused on dated 24.07.2018 accordingly the return memo was issued by the bank.

On cross examination he stated that he has no personal knowledge as to who has issued the memo as he was not present in the bank branch at that point of time. He cannot depose before the court about the account number of the complainant. He further deposed that the memo which has been shown to him in the court is a photostate copy.

Cw-4. Showkat Ahmad Bhat S/o Gh Nabi Bhat R/o Gawkadal Srinagar stated that the deponent is having friendly relations with the complainant and is well aware of the facts of the case. The complainant intended to purchase a residential house through Mohammad Maqbool Shah (Broker), the complainant and said Mohammad Maqbool Shah approached to Abdul Wahid Khan and accused who are the property dealers. The said Abdul Wahid and accused showed a double storied house

along with land measuring 1 kanal 5 marlas situated at Chinar Colony Baghat Barzulla to the complainant which was owned by Kashmiri Pandit lady namely Mst Koshaliya who was residing at Jammu. The said Abdul Wahid Khan claimed to be the authorized person to sell the said property and the complainant believed him and accordingly a sale consideration amount was fixed at Rs 1.16 cores which was accepted by the complainant and after selling the valuables, golden ornaments of his wife and availing loan from banks, the complainant managed the said amount and paid the same to the accused and said Abdul Wahid Khan who assured that the documents will be soon executed and the possession of the property shall be also delivered to the complainant. The said Abdul Wahid Khan and accused failed to deliver the possession of the property and in turn took the complainant to Jammu for documentation purposes and the complainant along with his wife went to Jammu along with said Abdul Wahid and accused where the complainant spent further huge amount but no document was registered at Jammu due to which the complainant demanded back his money from said Abdul Wahid and accused. The accused and his accomplice Abdul Wahid Khan thereafter demanded more amount from the complainant on mere escalating market rates and charged more amount over the already consideration amount and reached total sale consideration amount of Rs 1.80 crores and the complainant out of the said amount already paid an amount of Rs 1.40 crores but despite that no document was executed in his favour. Thereafter the accused took whole responsibility for executing the documents in favour of complainant and demanded an amount of Rs 40.00 lacs from the complainant and assured him that he will bring the original owner of the property for documentation and the complainant had no choice but to give the said amount of Rs 40.00 lacs to the accused. Despite receiving the said further amount of Rs 40.00 lacs, the

accused failed to execute any document in favour of complainant as a result of which the complainant demanded back his money from the accused and said Abdul Wahid Khan and accordingly for part payment the accused issued seven cheques in favour of the complainant in presence of the deponent each amounting to Rs 5.00 lacs. The said cheques were dishonoured on its presentation due to insufficient funds and then the complainant issued a legal notice to the accused for making the payment of cheques amount but the accused did not make the payment to the complainant.

On cross examination he has stated that he does not know about each and every transaction of the Mohammad Sidiq. It is wrong to say that accused Mohd Ashraf had written name and date on the cheque only amount was written on the cheque, with respect to the date, name the cheque did not bear any content, the date and name was written by Mohammad Sidiq himself on the cheque in the year 2018. He cannot depose that when accused has repaid the amount. He does not have any knowledge with respect to the demand draft dated 22.6.2014.

Statement of the accused u/s **342 Cr.PC** has been recorded on 15.04.2023. Various questions have been put to the accused.

Q. No.1. The complainant has deposed that the complainant had done one deal of purchase of house at Chinar colony for an amount 1 crore 18 lacs which actually belonged to Koshaliya Devi. The complainant has handed over the whole of the amount to you and asked for the document regarding the house and the land. The documents were not handed over to you by the complainant or one pretext or the other. Accordingly complainant demanded the money back from you and you issued seven number of cheques in favour of the complainant for an amount of Rs.35 lacs.?

Answer: It is not true that there was any transaction of sale purchase of house between the complainant and the deponent. The cheque has been issued as a measure of security purpose for an amount of Rs.35 lacs. The deponent does not have any liability to pay an amount of Rs.35 lacs towards the complainant.

Q. No.2. Complainant has presented these seven cheques in the bank branch for encashment and it was revealed by the bank authorities that there is no money lying in the account accordingly the complainant has obtained memo from the concerned bank.?

Answer: Deponent does not have any liability to pay the amount towards the complainant. Deponent does not owe him any legal debt.

Q. No.3. The notice was issued on your address however you have not made any payment towards the complainant.?

Answer: The deponent has not received any legal notice with respect to the payment of the money. The deponent has explained in the statement u/s 242 Cr.Pc in detail as to why the security cheque was issued in faovur of the complainant.

Accordingly accused has produced two defence witnesses as under;

DW-1 Farooq Ahmad Rather S/o Gh Hassan Rather R/o Hakeripora Pulwama has stated that he was an employee and had to leave the job for some reason and then started the job of filling of the land and continues to do the same job.

On cross examination he stated that he did not have any business transaction with the complainant, they resides at distance of 100 meters away from the each other and are neighbors. Deponent during his job

tenure was not engaged in any work, after he left the job he took up the job of filling of the land and also would do agricultural activity and was not doing any other work. He resides at Pulwama since 2019 till now. He knows about the business dealings of accused to some extent. He has no knowledge with respect to the case.

DW-2 Mazharul-Hassan S/o Gh Mohd Malla R/o Ichgam Budgam Branch Manager Incharge Ompora Budgam has stated that the accuseds account is in branch account. The bank statement pertains to the one of the account of his bank branch which has been marked as D15-A. It is true that on dated 2.6.2014 an amount of Rs.15 lacs and 17 lacs by virtue of two cheques numbers 275434 and 275433 have been deposited in the account of the Mohd Yousuf. The bank statement is the correct one. The transfer has been made from account to account.

On cross he has stated that the amount was deposited in the account of Mohd Yousuf Malik.

Perusal of the file reveals that the bank statement which has been produced by the accused before the court which has been shown to witness marked as Mark-A bearing date 24.08.23 wherein it reveals that the amount of Rs.15 lacs and 17 lacs by virtue of the above mentioned cheque numbers has been deposited into the account of Mohd Yousuf malik. The account statement belongs to Mohd Ashraf Mir.

Arguments by ld counsel for complainant are as under;

1. Why the accused made the payment of amount towards the account of Mohd Yousuf instead of making payment towards the complainant.
2. Accused in his statement has admitted that he issued cheques as security measure, he admits that cheque has been signed by him and

bear his signature.

3. If the cheque amount was paid in the account of Mohd Yousuf why the accused did not demand back the cheques which were given as a security measure from the year 2013 upto year 2018.

Before proceeding to the merits of the case, it is important to lay down the basic provision of law with respect to section 138 of the Negotiable Instruments Act, 1881 which is as follows:

Section 138 of Negotiable Instruments Act, 1881 makes dishonor of cheques an offence;

It provides that “where any cheque 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 other liability, 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, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both”.

- In order to ascertain whether the accused has committed an offence u/s 138 NI Act, the following ingredients constituting the offence have to be proved:

(a) The drawer of the cheque should have issued the cheque for the discharge, in whole or in part of a legally enforceable debt or other liability.

(b) 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.

(c) The drawer of such cheque fails to make the payment of the said amount of money within fifteen days of the receipt of the notice from the payee or the holder in due course demanding the payment of the said amount of money.

- It is only when all the above mentioned ingredients are together satisfied that the person who has drawn the cheque can be said to have committed an offence u/s 138 NI Act.
- As far as the first ingredient constituting the offence is concerned, the accused admits to have issued cheques annexed with the file. However he has stated that he has issued cheques as security measure.
- With regard to second ingredient the cheques have been returned by the bank with memo bearing endorsement that “funds insufficient”.
- The third ingredient that the drawer of the cheque failed to make payment after receipt of the notice from the payee.
- Accused in his statement has admitted that he issued cheques as security measure, he admits that cheque has been signed by him and bear his signature.
- The accused in his reply to questions put by the court u/s 251 Cr.PC has admitted to the issuance of the cheques by him in favour of the complainant. He has stated that the cheques in question bear his signatures. With these admissions i.e. the cheques in question belong to the accused and the signatures on the cheques are also of accused, a presumption of the cheques

having been issued in discharge of a legally sustainable liability and drawn for good consideration, arises by virtue of Section 118 (a) and Section 139 of the Negotiable Instruments Act. Once Section 139 of NI Act comes into picture, the court presumes that the cheques were issued in discharge, in whole or in part, of any debt or other liability. However, there is presumption under Section 139 of the Act, the case of the complainant stands proved. When the presumption is raised in favor of the complainant, the burden shifts upon the accused to disprove the case of the complainant by rebutting the presumption raised in favour of the complainant. Being the rule of reverse onus, it is the duty of the accused to prove that he does not owe any liability towards the complainant. The accused can displace this presumption on the scale of preponderance of probabilities and the lack of consideration or a legally enforceable debt need not be proved beyond all reasonable doubts. The accused has to make out a fairly plausible defense which is acceptable to the court. Thus, the accused can do either by leading own evidence in his defense or by raising doubt on the material/evidence brought on the record by the complainant.

On perusal of the bank statement the accused in his defence has given a clear picture that he has deposited an amount of Rs.15 lacs and 17 lacs and also two lac by way another transaction and 80 thousand in cash to the complainant in presence of Bashir Ahmad in the account of Mohd Yousuf Malik and some amount was paid in cash and 20 thousand was utilized in purchase of tickets as they went to Dehli on the instructions of the complainant.

The following defences have been raised by the accused:

- (a) The cheque is a security cheque there was no existing liability to the tune of cheque amount.
- (b) Cheque amount was returned to complainant as money was transferred in account of Mohd Yousuf on behalf of complainant.
- (c) Accused has not received any notice regarding the cheque.

Each of the grounds has been taken up one by one.

Since the accused has raised this plea therefore the complainant had to prove his case beyond reasonable doubt. The accused has rebutted the presumption in terms of provisions of section 139 of N.I Act by producing the bank statements showing that the amount has been deposited in the account of Mohd Yousuf Malik. Besides the complainant has in his cross examination stated that the accused has at the instance of the complainant transferred the amount of Rs.34.00 Lakhs in the account of the said Mohammad Yousuf as the complainant did not have PAN and Aadhar Card linked to his Account. The complainant has further stated in his cross examination that Mohammad Yousuf then prepared the demand drafts in the name of sellers Kaushaliya Devi, her sons namely Ajeet Kumar and Ajay Kumar. The complainant has also stated that the said cheques were received by him from the accused when the complainant transferred the money into the account of the accused, and also states that the said cheques were blank.

The statement of the accused and the complainant when read together are mutually cohesive and point out to the fact that the money has been transferred by the accused herein at the instance of the complainant in the account of Mohammad Yousuf besides the fact that Mohammad Yousuf

then prepared the draft in the name of Kaushalya, Ajeet Kumar and Ajay Kumar stands proved as the accused had filed an application seeking presence of branch manager Residency Road, Jammu and summons for production of the records pertaining to the afore stated drafts and the other side (complainant) has admitted the demand drafts and stated that there is no dispute with regard to preparation of demand draft. The order dated 24.08.2023 is elucidating the said assertion.

The relevant annexure i.e, the order dated 27.08.2024 reads as under;

“Ld. Counsel for the complainant present. Accused along with Counsel present. Defense witness Branch Manager Ompora, Budgam present. His statement recorded. Ld. Counsel for the accused has filed an application seeking issuance of summons against Branch Manager Residency Ro. J&K Bank Branch at Jammu. Ld. Counsel for the accused has submitted that the presence of the witness is required since he can prove the drafting of demand draft by the accused in favor of Smt Khushalya Dev, Ajay Kumar and Ajeet Kumar. Ld. Counsel for the complainant on ne other-hand has submitted that he does not dispute the drafting of demand draft by the accused in the name of Smt Khushalya Devi, Ajay Kumar and Ajeet Kumar or any other person except the complainant. Hence, Ld. Counsel for the complainant admits the witness.

After hearing submissions of both the Counsels it becomes clear that the presence of Branch Manager J&K Bank Residency Road, Jammu is not required i.e, the present case, since the document for which his presence is required is not disputed by the complainant. Accordingly, the application filed by the Ld. Counsel for the accused is disposed off.”

The following proposition can be summarized on a perusal of the judgments of the Hon'ble SC in APS Forex Services Pvt. Ltd. v. Shakti

International Fashion Linkers and Ors. [AIR 2020 SC 945]; Rohitbhai Jivanlal Patel v. State of Gujarat and Ors. [AIR 2019 SC 1876]; Basalingappa v. Mudibasappa, [(2019) 5 SCC 418]; Kumar Exports v. Sharma Carpets, [(2009) 2 SCC 513]; K.N. Beena v. Muniyappan and Anr., [(2001) 8 SCC 458]; and Dhanvantraï Balwantraï Desai v. State of Maharashtra [1964 Cri. LJ 437]:

(i) Once the execution of cheque is admitted; Section 139 of the NI Act mandates a presumption that the cheque was for the discharge of any debt or other liability;

The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities;

(iii) To rebut the presumption, the accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. While direct evidence cannot be insisted upon in any every case; bare denial of the passing of the consideration and existence of debt, would not serve the purpose of the accused;

(iv) Something which is probable has to be brought on record by the accused for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record 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;

(v) The words "unless the contrary is proved" which occur in Section 139, make it clear that the presumption has to be rebutted by 'proof and not

by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists.

(iv) The complainant has not produced any document alleged in the complaint in the form of Agreement to sell or any receipt of money or any purported document where accused has portrayed himself as Attorney holder of the Koushalya Devi and has received any money other than which was meant for preparation of demand draft by the accused, the amount of Rs.35.00 Lakhs which the accused has accepted to have received and the accused has given the proper account of how the money was returned back. Had the complainant entered into any agreement to sell with regard to property of Kaushaliya Devi with Accused he would have produced the same before the Court.

The accused ought to have received the cheques back as same were given as security measure which is also admitted by the complainant that the cheques were given as a security measure however, the accused has not obtained the cheques back from the complainant failure to receive the cheques back from the complainant does not necessarily means that the accused is to be booked for the commission of the crime as he has issued the cheques. There is no existing debt and liability against the accused person for which he could be booked. Since the accused has cleared the pending liability towards the complainant by making a payment in the account of Mohd Yousuf Malik therefore he was not supposed to make any payment towards the complainant after he has received the notice regarding the cheques from the complainant and he was not supposed to make the payment within 15 days as is required under the statute. The argument of the complainant that the cheque stand issued therefore the

accused need to be booked for the provisions of section 138 NI Act does not carve out a good case as mere issuance of the cheque is not sufficient to constitute offence. Keeping into view the facts and circumstances of the case into consideration and keeping into view the admission made by the complainant himself in his statement.

It is important to quote the purpose of security cheque.

- **Security cheque:** A Security Cheque can be defined as a cheque issued to a payee as security or surety for availing the option of drawing the same in an instance where the drawer fails to fulfill the future obligations arising from a business deal or any other such transactions. Security cheques are thus issued in furtherance of a financial obligation and acts as a surety for the person accepting such cheque.

In the case of Indus Airways Private Limited v Magnum Aviation Private Limited (Indus Airways Case), the Apex Court clarified its position wherein a security cheque was issued in the form of advance payment of a purchase order, however, on the subsequent cancellation of the purchase order, the security cheque was dishonored. By way of the aforementioned judgment, the term legally enforced debt or other liability was emphasized upon, also particularly the fact that there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. Thus, in the Indus Airways case, it was held that a Post-dated cheque issued in order to make an advance payment could not qualify as cheque for discharge of debt however there may be liability subsisting under the Contract act but a case of dishonoring of cheque as per Section 138 cannot be made out.

The Supreme Court in the past five years has adjudicated upon cases of security cheques and post-dated cheques (having the character of security cheques) and has taken a different approach towards the culpability under Section 138. The Apex Court in the case of Sampelly Satyanarayana Rao v Indian Renewable Energy Development Agency Limited (*Sampelly case*) held that wherein a post-dated cheque described as 'security' in the loan agreement is dishonoured, the same would be punishable under Section 138 of NIA. The Supreme Court drew a distinction between the sampelly case and the Indus Airways case stating that the true test was whether the cheque was in discharge of an existing enforceable debt or liability or whether it was towards an advance payment without there being a subsisting debt or liability. It was held that the repayment of the loan amount fell due under the agreement the moment that the loan was advanced and the installments fell due; thus, the dishonored cheques fell within the scope of Section 138 of the act. As such, the dishonored cheques represented outstanding liability.

From the record it is also born out that the complainant has already received an amount of Rs.40 lacs from Mohd Yousuf Malik as he has filed an application before the crime branch wherein the complainant has accepted to have received an amount of Rs.40 lac from Mohd Yousuf and Mohd Yousuf will have to pay more 30 lacs in addition to it. The communication which the complainant has made before the crime branch has been placed on record by the accused.

Keeping into view the whole of the evidence on record it transpires that the cheque which has been received by the complainant from the accused has been misused by the complainant for reasons best known to the complainant, the complainant would not prove any of the ingredients

which could constitute the commission of crime in terms of provisions of section 138 NI Act or 420 IPC.

As such complaint in hand is dismissed. Accused is acquitted of all the charges levelled against him, liability under bonds stands discharged. File be consigned to records after its due compilation under rules.

Announced

28.06.2024

Ms. Tabasum (JK00173)
Judge Small Causes Srinagar