

IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl. A. NO. 118/2005

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Judgment delivered on: 23.11.2010

M/s. Investor Plaza

..... Appellant

Through: Mr.S. Khan, Adv.

Versus

Vijay Sachdeva & Ors.

..... Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J. Oral:

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1. By this criminal revision filed under Section 397 r/w Section 401 and 482 of Cr.P.C., 1973, which was directed to be treated as an appeal pursuant to an order dated 4.2.2005 passed by this court, the appellant seeks to
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challenge the order dated 8.10.2003, passed by the Additional District Judge, whereby the complaint case filed by the appellant under Section 138 of the Negotiable Instruments Act, 1881, was dismissed.

2. The brief facts of the case relevant for deciding the present petition are as under:-

The case of the appellant is that the accused respondent Shri Vijay Sachdeva was the client of the appellant firm and had been placing orders for the purchase and sale of shares and debentures and other securities in his name through the appellant firm. The appellant runs an account no. 250 with Oriental Bank of Commerce, Branch Office at G.T. Karnal Road, Delhi and the respondent was running an account no. 55437 with Punjab National Bank, Branch Office, Subzi Mandi, Delhi. The respondent issued a cheque bearing no. 503386 dated 28.6.2001 for Rs.1,55,000/- drawn on Punjab National Bank, Branch Office, Subzi Mandi, Delhi being part payment of his total liability in favour of the appellant. On 26.7.2001 the appellant deposited the said

cheque with its banker i.e. Oriental Bank of Commerce,
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Branch Office at G.T. Karnal Road, Delhi for encashment. On 27.7.2001, Punjab National Bank, received the said cheque through Oriental Bank of Commerce and the cheque was dishonoured on account of 'insufficiency of funds' and also because of 'signature of drawer differing'. The appellant served a legal notice dated 31.7.2001 on the respondent asking for the payment of the bounced cheque amount but the respondent did not make the said payment within the stipulated period hence the appellant filed a complaint before the competent court. The learned trial court after appreciating evidence on record acquitted the respondent with the observation that Section 138 of Negotiable Instruments Act, 1881 will not be attracted in case the cheque is returned unpaid on account of difference in signature of drawer and further held that the offence under Section 138 N.I. Act is not proved in the instant case. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Vide order dated 3.8.2010, notice of default was sent to both the counsel representing the parties and even
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despite service of notice, counsel for the respondent did not choose to appear in the matter. This matter was heard by this court on 18.11.2009 and the matter thereafter was reserved for orders. Both the parties have also filed their written synopsis.

4. Mr. Khan, counsel for the appellant, states that as undertaken by him he had informed about this date to Mr. Ajay Bir Singh Jain, counsel who has been representing the respondent. Mr. Khan also states that the matter may be decided by this court based on the written submissions filed by both the parties. Accordingly, I proceed to decide this appeal based on the written submissions placed on record by the parties.

5. Counsel for the appellant, submits that the impugned judgment passed by the learned Trial Court is ex-facie illegal as the learned Trial Court, without there being any evidence on record, had assumed that the ground of “insufficient funds” for the return of the cheque in the bank memo had been added subsequently and the main ground for return of the cheque was the difference of signatures of the

drawer. Drawing attention of this Court to the deposition of bank witness produced by the respondent, counsel submitted that DW1 Shri Rakesh Kumar Jain in his examination-in-chief clearly stated that the accused did not operate his account since 1999 and that no such instructions were received by the bank from the drawer of the cheque to stop payment of the cheque on the ground of loss of the same. Counsel further submits that the respondent failed to rebut the presumption as arising in favour of the appellant under Section 139 and 118 of the Negotiable Instruments Act read with Section 114 of the Evidence Act as the respondent failed to lead any evidence to show that the said cheque was returned on account of difference in signatures. Counsel further submits that even the respondent accused did not place any material on record to show that there were sufficient funds in his account to clear the amount of the cheque issued by him. Counsel thus submits that if the bank has given the reasons that the cheque was dishonoured on account of insufficient funds then the appellant has a remedy to file the complaint under Section 138 of the Negotiable

Instruments Act and the Court need not look into other grounds given in the memo. The contention raised by the counsel for the appellant is that in the bank memo one of the reasons disclosed was “insufficient funds” for the return of the cheque and this ground was sufficient to invoke Section 138 of the Negotiable Instruments Act. Counsel further submits that the main defense raised by the respondent was that he lost the cheque in question and the appellant had filled up the cheque in question and presented the same with his name. Counsel further submits that the appellant had successfully proved his case before the learned Trial Court, but the respondent did not lead any positive evidence to rebut the presumption which arose in favour of the appellant. Counsel while referring to question No. 13 of the statement of the respondent under Section 313 Cr.P.C. submits that the respondent has taken a stand that his wife had sent a request to the bank regarding missing of the cheque but no such request was produced on record by the respondent and the said stand taken by the respondent is otherwise in contradiction to the stand taken by DW1 wherein he stated

that no such request was ever received by the bank to stop the payment of the cheque on account of loss of the said cheque. The contention of the appellant is that the said statement of DW-1 clearly shows that no intimation was sent by the respondent to the bank about loss of the said cheque. Counsel further refers to the deposition of another bank witness PW-3 who also made a categorical deposition that the cheque was dishonored on account of both the grounds, then, how the court in the absence of any material could assume that the cheque was dishonored only on account of difference in signature. In support of his arguments, counsel for the appellant placed reliance on the following judgments:-

- 1) K.N. Beena Vs. Muniyappan & Anr. –2001 Cri L. J. 4745 (SC)
- 2) Hiten P. Dalal Vs. Bratindranath Banerjee – AIR 2001 SC 3897
- 3) M/s P.V. Constructions Vs. Sh. K.J. Augusty – 2007 CrLJ 154 (Bom.)
- 4) NEPC Micon Ltd. & Ors. Vs. Magma Leasing Ltd. – 1999 CrL. L.J. 2883 (SC)
- 5) K. Bhaskaran Vs. Shankaran Vaidhyan Balan & Anr. AIR 1999 SC 3762

- 6) Abdul Rehman M. Mulgand, Civil Contractor Vs. Sh. Mohammad Hashan Mulgand & State through Public Prosecutor – 2006 Cri L.J. 1159 (Bom)
- 7) T. Kalavathy Vs. Veera Exports – 2001 (1) ALT (Crl.) 465(Mad)
- 8) Ramesh Chandra Rajnikant Kothari Vs. Gunvantlal Shivilal Shah And Anr. – (1998) 94 Comp Cas 549 (Guj)
- 9) Om Prakash Bhojraj Maniyar Vs. Swati Girish Bhide & Ors Vs. 1992 (2) BomCR 106
- 10) G.Venkataramaniah Vs. Sillakollu Venkateswarilu& Anr. 1999 Cri LJ 1219 (A.P.)
- 11) Canbank Financial Services Ltd. Vs. Gitanjali Motors Ltd. & Ors—1995 Crl. LJ 1222 (Del)

6. The stand of the respondent is that admittedly there was a structural defect in the negotiable instrument because of the difference in the signatures as indicated by the bank in the bank memo in terms of clause 12. The contention of the respondent is that if the cheque is returned on account of the structural defect then the bank is not supposed to give any other reason in the bank memo and if any other ground is given that cannot be considered because the negotiable instrument itself was defective due to the structural defect. The respondent has submitted that it was incumbent upon the

complainant to establish a clear case to prove the fact that the cheque was dishonored on account of insufficient funds and not for the reason of difference in signature. The respondent has further submitted that it was proved on record that his bank account no. 55437 with Punjab National Bank, Branch Office, Subzi Mandi, Delhi was an inoperative account. Respondent further submitted that in fact the respondent had never accepted that any such cheque was issued by him and rather the stand of the respondent in his defence is that the cheque was lost by his wife for which even the bank was duly apprised of. The respondent has thus submitted that he has successfully rebutted the presumption and, therefore, the learned Trial Court has rightly dismissed the complaint filed by the appellant. In support of his case, counsel for the respondent has placed reliance on the following judgments :-

1. Shri Babulal Nainmal Jain Vs. Sh. Khinji Ratansha Dedhia & Ors. – 1998 CriLJ 4750 (Bom) and
2. Rejikumar Vs. Sukumaran 2002 CriLJ 3255(Ker)

7. I have heard learned counsel for the parties and perused the records.

8. Section 138 of the Negotiable Instruments Act was incorporated with a specific object of enacting a special provision to impose a strict liability so far as the negotiable instruments are concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, the trade and commerce activities in the present day world are likely to be adversely affected as it is impracticable for the trading community to carry on with the bulk of the currency in force.

9. Coming to Section 138 of the Negotiable Instruments Act, In ***Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd.,(2001) 6 SCC 463***, the offence is explained in the following words:

"4. Section 138 of the Act makes a civil transaction to be an offence by fiction of law. 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 is returned by the bank unpaid either because of the amount or money standing to the credit of that person being insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person, subject to the other conditions, shall be deemed to have committed an offence under the section and be punished for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both. To make the dishonour of the cheque as an offence, the aggrieved party is required to present the cheque to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier and the payee or the holder in due course of the cheque makes a demand for payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and drawer of such cheque fails to make the payment of the amount within 15 days of the receipt of the said notice. Section 139 refers to presumption that unless the contrary is proved, the holder received the cheque of the nature referred to under Section 138 for the discharge in whole or in part or of any debt or other liability. Section 140 restricts the defence in any prosecution under Section 138 of the Act and Section 141 refers to such offence committed by the companies. Section 142 provides that, notwithstanding anything contained in the Code of Criminal Procedure, no court shall take cognizance of an offence under the section except upon a complaint in writing made by the payee or, as the case may be, the holder of the cheque and that such complaint is made within one month of the date on which the cause of action arose under clause (c) of proviso to Section 138 of the Act."

10. In ***Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd., (2000) 2 SCC 745***, the Hon'ble

Apex Court explained the ingredients of the offence under S.

138 N.I. Act as under:

10. *On a reading of the provisions of Section 138 of the NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are:*

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

11. It is a well settled legal position that the presumption u/s. 118 and 139 N.I. Act is a rebuttable presumption and the burden lies on the accused to prove that he had no liability/debt on the date of issue of the cheque. It is also a settled principle of law that to bring home an offence

under any of the penal provisions, it is essential to prove the case beyond reasonable doubt and the ingredients of the offence should be satisfied. It would be relevant to refer to the judgment of the Apex Court in the case of **Hiten P.Dalal v. Brantindranath Banerjee AIR 2001 SC 3897**, where it was held that:

"The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "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, of any debt or other liability". The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A. Vaidvanatha Iyer: 1958CriLJ232 : 1958CriLJ232, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces

evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.

24. Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantraai Balwantraai Desai vs State of Maharashtra : 1964CriLJ437 : 1964CriLJ437, where this Court reiterated the principle enunciated in State of Madras vs Vaidyanath Iyer (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision 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. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted..."

12. Coming to the facts of the case at hand, the complaint under Section 138 of the Negotiable Instruments Act was filed by the appellant mainly on the allegation that the respondent had issued a cheque bearing No. 503386 in favour of the appellant and the said cheque on presentation by the appellant was returned by the drawee bank with the reasons "insufficient funds" and "signature differs". The appellant served a legal notice dated 31.7.2001 upon the respondent but despite receipt of the said legal notice, the respondent did not come forward to make payment of the said dishonoured cheque within the stipulated period. The appellant examined three witnesses in support of his complaint case, i.e., PW-1, proprietor of the appellant firm, while PW-2 and PW-3 were the bank witnesses. On the other hand, the respondent examined only one witness in his defense i.e. DW-1 Shri Rakesh Kumar Jain, clerk of Punjab

National Bank. The appellant in his evidence duly proved its statement of account as Ex.PW2/A and the bank memo as Ex. PW2/C. Statement of account of the respondent was also proved on record as Ex.DW1/A to DW1/D. The respondent in his statement recorded under Section 313, Code of Criminal Procedure took a stand that the cheque in question had been lost and his wife had sent a request to the bank regarding missing of the said cheque. The learned trial court after taking into consideration the evidence produced on record by both the parties came to the conclusion that the ground of 'insufficient funds' on the bank memo was added subsequently by the appellant while the main ground for return of the cheque was difference of signatures. The court thus took the position that Section 138 of the Negotiable Instruments Act will not be attracted in a case where the cheque was returned on account of difference in signatures.

13. The finding of the learned trial court is perverse and irrational on the very face of it. This court is not able to find as to how the said finding was arrived at by the learned

trial court. In the bank memo proved on record as Ex. PW2/C, the ground at serial no. 7 i.e. insufficient funds was circled while the ground at serial no. 12 was tick marked. The witness PW-2 and PW-3 in their depositions clearly deposed that the said cheque was returned as dishonored on account of 'insufficient funds' and also because of the 'difference in the signature'. PW-2 Davender Kumar, in his cross-examination affirmed the fact that the said memo besides containing the ground of insufficient funds also contained another ground i.e. difference in signature of the drawer. Once the bank witnesses had taken a position that the said cheque was dishonoured on account of the abovesaid two grounds, then how did the learned trial court assume that the ground of insufficiency of funds was added later on in the said bank memo. The finding of the learned trial court is thus ex-facie illegal and perverse. The respondent also failed to substantiate his defense to prove that the said cheque was lost by him. The bank witness DW-1 nowhere stated that any intimation was received by the bank with regard to the loss of the said cheque.

14. The judgment of the Bombay High Court in the case of *Shri Babulal Nainmal (supra)* cited by the respondent would be of no help as in the said case there was no mention of insufficiency of funds in the account and the bank memo only mentioned 'refer to drawer' as the ground for returning the cheque as it was not in proper form. Hence it is clearly distinguishable on facts from the present case. The other judgment of the Kerala High court cited by the respondent in the case of *Rejikumar (supra)* would also not help the case of the respondent as in the said case the issuance of cheque could not be proved and therefore liability under Section 138 could not be fastened on the accused, which is not the situation in the present case.

15. In the light of the aforesaid discussion, this court is of the considered view that the appellant has successfully proved the ingredients of Section 138 of the Negotiable Instruments Act based on the said dishonored cheque which was dishonored by the bank on account of two grounds and one of the grounds being 'insufficient funds'.

16. The impugned order 8.10.2003 is accordingly set aside.

17. The respondent is hereby directed to pay the cheque amount of Rs.1,55,000/- along with a fine of Rs.1,55,000/- within a period of one month from the date of this order and on failure to pay the said amount the respondent shall undergo imprisonment for a period of three months.

18. The appeal is allowed accordingly.

November 23, 2010

KAILASH GAMBHIR, J