

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Order: 6th July , 2010

Crl. R. P. No. 335 of 2010

%

HARMINDER VIRDI

Through: Mr. RPS Sirohi, Advocate

06.07.2010

... Appellant

Versus

N.K. GUPTA

Through: Nemo

...Respondents

JUSTICE SHIV NARAYAN DHINGRA

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

ORAL

1. Present revision has been preferred against the order of learned ASJ dated 15th March, 2010, whereby she dismissed the appeal filed by the petitioner against the judgment of learned MM dated 26th September, 2008, convicting the petitioner for an offence under section 138 Negotiable Instrument Act. Main ground taken by the petitioner before this court is that the trial court ignored the settled legal position that accused had a constitutional right to maintain silence. The defence of the accused was to be considered on the basis of preponderance of probabilities and it was not necessary for accused to adduce evidence or to

examine himself and non examination of the accused did not mean that the accused was raising false defence.

2. The other ground taken by the accused counsel is that the accused sentence under section 138 of Negotiable Instrument Act was modified by the learned ASJ to the period already undergone, but the learned ASJ directed that in case of nonpayment of compensation, the petitioner would further undergo simple imprisonment for a period of six months and this simple imprisonment for six months should have been directed to run concurrently with substantive sentence.

3. None of the two grounds raised by the petitioner in the revision petition is tenable. The complaint against the petitioner was filed under section 138 of Negotiable Instrument Act after dishonor of the cheque issued by petitioner. The petitioner's plea during arguments had been that the cheque was issued without consideration. A legal presumption is there against the person who issues cheque that the cheque was issued for a valid consideration. This presumption can be rebutted only by way of cogent evidence to be led by the person who wants this presumption to be rebutted. A person cannot plead before the court that he would not lead evidence because he had a right to silence but the court should consider his defence without evidence. It is the choice of the accused to keep silence. If the accused keeps silence in respect of those facts the onus of proof of which lies upon the accused under law, the accused has to suffer. Section 106 of Indian Evidence Act specifically lays down that when any fact is

especially within the knowledge of a person, the burden of proving that fact is upon him. Whether a cheque was issued without consideration or it was not payable for any other reason, was within the special knowledge of the petitioner and the onus to prove this defence was upon the petitioner notwithstanding that the petitioner was an accused and had a right to silence. This defence of the petitioner could not have been considered by the court without evidence produced by the petitioner. I, therefore, consider that there is no ground to interfere with the decision of the first appellate court.

I also find no force in the argument made by the petitioner that substantive sentence and the sentence of simple imprisonment in lieu of compensation should run concurrently. If that is allowed, nobody would pay the compensation as provided under Negotiable Instrument Act and the sole purpose of the Act would stand defeated. The petitioner in this case had by his conduct shown that he was determined not to pay cheque amount. I consider even otherwise the substantive sentence has to run first and the sentence in lieu of nonpayment of cheque amount/compensation has to run subsequently. The two cannot run concurrently. I find no force in this petition. The petition is dismissed.

July 06, 2010
acm

SHIV NARAYAN DHINGRA J.