

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

+ **Crl Rev. P.No.126/2011**

% *Judgment reserved on :28th July, 2011*
Judgment delivered on:23rd August, 2011

BHARAT BHUSHAN Petitioner

Through: Mr.Arun Mahajan and
Mr. Rajesh Arora, Advs.
versus

STATE & ANR. Respondents

Through: Mr. Sushil Kaushik for
Mr.Satish Aggarwala, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

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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 |

SURESH KAIT, J.

1. By the instant petition, the petitioner has prayed to set aside the judgment dated 22.11.2004 and order on sentence dated 24.11.2004, whereby, the petitioner was sentenced to undergo SI for one year and fine of ₹5,000/-.

2. He has further challenged the order dated 02.02.2011 passed by the learned Addl. Sessions Judge, South East, Saket Courts, New Delhi, whereby, the substantive sentence of one year awarded by the Id. trial court was done away with. However, the fine was enhanced to ₹16,40,000/-.

3. The case of the respondent No.2./complainant in brief was that he was in need of a loan of ₹30 lacs and as such he came into contact with the petitioner who assured him of loan. After discussion, the petitioner told the respondent No.2 that Manager of Vaish Cooperative Bank, Darya Ganj Branch had agreed to advance a loan of ₹30 lacs.

4. The respondent No.2 signed various documents in respect of grant of loan of ₹30 lacs, trusting the petitioner.

5. It was also the case of the respondent No. 2 that he paid in cash a sum of ₹ 8.21.600/- to the petitioner on his representation that this amount was to be deposited in the bank as margin money and also towards other related expenses. The petitioner told the respondent No. 2 that he had deposit the aforesaid amount with the bank. In this respect he showed a receipt to the respondent but did not handed over the same to him.

6. When the respondent No. 2 enquired about the loan, he was told by the petitioner that proposal was at the final stage. Ultimately, when the petitioner failed to get the loan sanctioned, the respondent demanded the aforesaid amount of ₹ 8,21,600/-. To discharge that liability, the petitioner was alleged to have issued cheque in the sum of ₹ 8,21,600/- bearing No.989849 dated 19.10.2001 drawn on State Bank of Bikaner and Jaipur, Janakpuri, New Delhi.

7. Further, the case of the respondent No.2 was that on presentation for encashment the aforesaid cheque issued by the petitioner the same was received back dishonoured with the remarks "Insufficient Funds". Whereupon, legal notice dated 10/12.11.2001 was sent to the petitioner by registered post dated 12.11.2001 and through certificate of posting dated 13.11.2001, but the petitioner failed to make the payment. Thereafter, the respondent No. 2 filed the complaint against the petitioner.

8. Vide order dated 02.01.2002 the petitioner was ordered to be summoned for an offence under Section 138 of the Negotiable Instruments Act, because prima facie case had been made out against the petitioner and notice for the

aforesaid offence was served upon the petitioner on 26.11.2002. Since the petitioner pleaded not guilty and claimed trial, respondent No.2 examined himself as CW1.

9. The petitioner, when examined under Section 281 of Cr.P.C., denied to have issued cheque in question in favour of the complainant. The case of the petitioner was that the respondent No.2 was to supply him cloths which were never supplied and he had been falsely implicated. However, the petitioner opted not to lead any evidence in defence.

10. It is pertinent to mention here that when the case was pending for final arguments, the petitioner came forward with an application under Section 315 of Cr.P.C. Ultimately, he examined himself as his own witness as DW1 while tendering into evidence his affidavit Ex.CX.

11. Ld. counsel for the respondent No.2 while arguing before the trial court has referred to the statement of respondent No.2 and other documents available on record and argued that the case of the respondent No.2 stood duly established against the petitioner.

12. On the other hand, Id. counsel for the petitioner has referred to the material available on record and argued that

the petitioner issued the cheque in question only towards security for the goods which were to be supplied by the respondent No.2 to the petitioner but since the respondent No.2 never supplied those goods, the petitioner had no liability to discharge and as such the complaint was liable to be dismissed.

13. The respondent No. 2 filed complaint on the basis of which the alleged cheque No.989849 dated 19.10.2001 for ₹ 8,21,600/- was issued by the petitioner. While appearing in court as CW1, he has proved cheque Ex.C1, and after deposing about the circumstances which led to its issuance by the petitioner in his favour. He has stated in his statement that he wanted loan for MRI machine, advertised for the same and the petitioner contacted him and assured to arrange for loan from Vaish Co-operative Bank. He further deposited that the petitioner asked him to become member of said bank but for that he was required to pay some amount so that loan could be sanctioned. Since he was in need of ₹ 30,00,000/- for the machine and the petitioner told him that he would have to pay 5% margin money to get this much amount of loan. Further, according to the respondent

No. 2 he paid ₹ 8,21,600/- to the petitioner towards margin money. He had explained that initially the margin money was to be extent of 5% but ultimately petitioner went on increasing the same. The petitioner had told the respondent No. 2 that insurance premium was also to be paid.

14. The respondent No. 2 further deposed that he had been asking the petitioner about sanctioning of the loan. The petitioner always gave an assurance that the same was in process. Ultimately, the petitioner told him that he could not get the loan from the aforesaid Vaish Co-operative Bank and rather he would get the loan sanctioned from Delhi Co-operative Bank. He further deposed to have approach Delhi Co-operative Bank, as per membership given by the accused but the same was found to be false. Thereafter, he asked the petitioner either to get the loan sanctioned or to return the money which he has obtained from him. According to the respondent No. 2, the petitioner then gave him cheque Ex. C1.

15. There is nothing in cross-examination of the respondent No. 2 to disbelieve this version narrated by him. It is true that the respondent No. 2 did not obtain any receipt

from the accused while paying him ₹ 8,21,600/- towards margin money to get loan sanctioned from the bank, the same did not adversely affect the case of the respondent No.2 particularly when accused had not disputed his signature on cheque Ex. C1.

16. During cross-examination under Section 281 of Cr.P.C., the petitioner came forward with the plea that the cheque was not issued by him in favour of the respondent No. 2. At the same time, he pleaded that respondent No. 2 was to supply him clothes which were never supplied and that he had been falsely implicated. Thereafter, the petitioner stepped into witness box as DW1 and tendered into evidence his affidavit Ex. DX.

17. As has been observed by the Id. Trial Judge on perusal of para No.2 of the affidavit Ex.DX would reveal that the petitioner in the third line of that paragraph denied to have issued that cheque Ex. C1 to re-pay any debt amount, but in the fourth line of that paragraph he admitted to have given that cheque to the respondent No. 2, further pleading that it was given by him without any amount and by way of security.

18. The Trial Judge has recorded from this deposition in that paragraph, it can safely be said that petitioner has come forward with inconsistent and self-contradictory pleas. Version of petitioner appears to be that the cheque was blank at the time it was given to the complainant. However, in his cross-examination as DW1 the accused admitted to have given cheque Ex. C1 to the complainant towards security. However, the petitioner has not led any cogent and convincing evidence that the cheque Ex. C1 is in his handwriting. He could get the contents of cheque scientifically examined from any expert but he did not take any step in that direction, for the reasons best known to him. The petitioner has admitted in his cross-examination that the cheque bears his signatures. Presumption of consideration is attached to the cheque.

19. The petitioner had come forward with the plea that that cheque was given to the respondent No. 2 towards security. He is alleged to have placed orders with the complainant for supply of clothes. However the petitioner had not placed on record any document to show that any such order was placed by him with the respondent No. 2.

20. In his cross-examination he deposed that first order placed by him with the respondent No. 1 was of ₹ 50,000/60,000/-. However, for want to any documentary evidence in this respect. It cannot be said that petitioner had placed any such order with the respondent No. 2.

21. It is also not the case of the petitioner that any point of time he issued any notice to the respondent No. 2 asking him not to present the cheque or to bankers for stoppage of payment, on account of non-supply of goods/clothes to him by the complainant. Consequently, it cannot be said that cheque Ex.C1 was given by him to the complainant by way of security.

22. The respondent No. 2 had proved on record cheque return memo's Ex.C2 and Ex.C3 which would reveal that cheque Ex.C1 presented for encashment was received back as dishonoured with reason "insufficient funds". Legal notice Ex. C-4 had been issued had been duly proved on record. The petitioner has admitted in his cross-examination to have sent reply to the notice received from the respondent No. 2. Reply to the legal notice is Ex.C7 dated 27.11.2001. The evidence on record showed that the petitioner did not make

any payment to discharge liability to the cheque whereby the respondent No. 2 had to knock at the door of the court by filing the complaint on 02.01.2002.

23. The Id. trial judge, keeping in view the aforesaid evidence, was of the view that the cheque Ex.C1 was issued in favour of the respondent No. 2 to discharge liability of ₹ 8,21,600/-, therefore, the trial judge held that the allegations in the complaint stands fully established against the petitioner. Therefore, the petitioner was held guilty by the trial judge.

24. The petitioner, being aggrieved by the aforesaid judgment of the trial judge had assailed and filed appeal in the Court of Addl. Sessions.

25. The Id. counsel for the petitioner argued that before the Id. ASJ in appeal that the respondent No. 2 had come forward with a false and concocted story regarding the issuance of cheque by the petitioner in discharge of any legally recoverable liability. He submitted that as per the version of respondent No.2, payments of money were made to the petitioner outside the car parking of Maurya Hotel and that too without taking any receipts of acknowledgements

from the petitioner. He submitted that neither 5% of ₹ 30 lacs nor 20% of ₹ 30 lacs was paid and the amount given was ₹ 8,21,600/-. Further, the Id. counsel for the petitioner submitted that respondent No.2 was not very sure about the purpose for which he required the loan amount. In cross-examination, respondent No.2 stated that he took loan as he wanted to pledge the machines and later on stated that the loan amount was required for maintenance of MRI machine.

26. Ld. ASJ that the money which respondent No.2 had paid to the petitioner was stated to be withdrawn from his personal account but in cross-examination he stated that the amount paid to the petitioner consisted of amount paid by Doctor V.K. Jaiswal. He argued that the cheque in question was issued by the appellant by way of security during the business dealings as the respondent was to supply clothes to the appellant and respondent failed to prove his version.

26. On the other hand, Id. counsel for the respondent No. 2 submitted that the money was taken out of his personal bank account and thereafter, it was explained in the cross-examination that it included the amount paid by Dr. Jaiswal. He had submitted that it was not the stand of respondent

No.2 that ₹ 8,21,600/- was paid to the appellant as 5% or 20% margin of the loan amount of ₹ 30 lacs. Initially, the margin demanded was 5% which was later increased to 20%. It was evident from affidavit of the respondent No.2. and his cross-examination that ₹ 8,21,600/- was demanded by the petitioner and was paid to him on account of 20% of the loan amount apart from insurance and other related expenses. Respondent No.2 deposed that he took some amount in cash from Dr. Jaiswal and deposited in his own account from which it was later withdrawn and cash was given to the petitioner. Dr. Jaiswal and the respondent no. 2 are stated to be business associates. It was the admitted case of the petitioner that he had issued the cheque to respondent No.2.

27. Ld. A.S.J. had gone in the depth of the case and discussed the relevant law as laid down in the case of **Hiten P. Dalal vs. Bratindranath Banerjee**, 2001 (2) JCC (SC)

51, as under:-

“The nature of the presumption under Section 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non payment after receipt of notice by the drawer of the cheque. All three

conditions have not been denied in this case. 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. 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.

It is well settled that 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 complainant 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. 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."

28. The Id. ASJ noted that record showed that the petitioner had been taking shifting stands. In the statement of the petitioner under Section 313 of Cr.P.C., he stated that "he never issued the cheque in favour of the complainant." Later on, he submitted that he did issue the cheque but it was given as security to the respondent No.2 for payment that was to be made by the petitioner to the respondent No.2 for supplying clothes to the petitioner and thus it was not against a legally enforceable debt as the respondent No.2 failed to supply the clothes.

29. The Id. A.S.J. further found merits in the submissions of Id. counsel for the respondent that minor discrepancies are natural due to time gap between the date of incident and date of evidence and also due to human fallibility.

30. The Id. A.S.J. further discussed the case law as held in the case of **Inder Singh & Anr. Vs. State (Delhi Administration)** – *AIR 1978 SC 1091*, which is as under:-

“An unmerited acquittal does no good to the society. Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefits thereof where none reasonably exists. A doubt has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. The courts should display a greater sense of responsibility and have to be more sensitive..”

31. The Id. trial judge has noted the contention of the petitioner that the cheque issued by him was not in discharge of a legally enforceable debt as payment was made by the respondent No.2 outside Maurya Hotel, has no merit. Only because, the venue at which the cash exchange hands was at a public place like outside the Maurya Hotel, would not imply that the cheque was not given in discharge of a legally enforceable debt.

32. The Id. trial judge found no merit in the contention that the cheque issued by him was not in discharge of a legally recoverable debt as no receipts were taken by the

respondent when he made payment to the petitioner. The Id. A.S.J. was of the opinion that there was no requirement of law that a receipt has to be taken whenever cash exchanges hands. However, it appears from the testimony of the respondent No. 2 that it is evident that after two days of receiving payment, petitioner showed a receipt to the respondent No. 2 which purportedly was receipt of the payment to the bank by the petitioner. However, the petitioner refused to give the receipt to the respondent No.2. Respondent No.2 insisted that he wanted payment in cash from the petitioner.

33. The trial judge has also dealt with the other contentions urged by the Id. counsel for the petitioner that the cheque issued by him was not in discharge of a legally enforceable debt as cheque was issued by the petitioner as security against the respondent supplying clothes to the petitioner and not against a legally enforceable debt. The Id. trial judge was of the view that in this respect, petitioner has failed to produce any evidence to show that he had issued the cheque as a 'security' to the respondent No.2 for payment that was to be made by the petitioner to the

respondent No.2 for supplying clothes to the appellant. Appellant appeared in the witness box to support his case as DW1. In cross-examination, he deposed that turn over was about 10-12 lacs. He further stated that the respondent did not tell the name of his company and was accompanied by Doctor Jaiswal. He did not get this fact verified whether the respondent was actually dealing with clothes. He did not place any written order but only placed verbal orders. He further deposed that the first order which petitioner placed was ₹ 50,000/- to ₹ 60,000/- and gave the cheque Ex.C1 as 'security'.

34. The Id. ASJ in appeal has observed that the burden was on the petitioner to disprove the presumptions under Sections 138 and 139, which he failed to discharge at all. The petitioner did not produce any order or agreement that allegedly took place between the two. The Id. A.S.J. was of the view that it does not appeal to common sense and is not convincing at all on the face of it, that one would give a blank cheque as security for making payment for clothes worth ₹ 50,000/- to ₹ 60,000/- to someone with whom up to that time there was not even a single agreement or dealing.

35. The Id. A.S.J. in appeal has also dealt with the contention of the petitioner that the cheque was not filled by him but by someone else. Even otherwise, in view of Section 20 'when a cheque is given in blank, person regarding the cheque given prima facie, authority to the holder thereof to make or complete, as negotiable instrument'.

36. Thus, in view of the Id. A.S.J., the petitioner had taken shifting stands. In his statement u/s 313 of Cr.P.C., petitioner submitted that he never issued the cheque in favour of the respondent No.2. Secondly, it was submitted that he did issue the cheque, but it was given as 'security' to the respondent No.2 for payment, that was to be made by the petitioner to the respondent No.2 for supplying clothes to him and that it was not against a legally enforceable debt as the respondent No. 2 failed to supply the clothes.

37. Respondent No.2 has categorical deposed that he withdrew cash from his personal account so as to pay to the petitioner and stated that he could prove this by producing his Income Tax Return and bank statement. The petitioner

did not ask for and called him to produce the Income Tax Return and bank statement to disprove the same. He could have asked the court to direct respondent No.2 to produce the same.

38. Keeping in view the aforesaid discussion in view, the learned A.S.J. found no infirmity or illegality in the impugned order passed by the learned MM. Therefore, conviction of the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act was upheld.

39. While dealing with sentence the Id. appellate court has held that the objectives of the provisions of Section 138 of the Negotiable Instruments Act are to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in face of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers. It was intended to provide a speedy remedy to avoid injury or inconvenience to the payee or endorsee in view of the fact that due to the latter's unexpected

disappointment he will have to lick the dust while meeting his own future commitments made to others.

40. The Id. counsel for the respondent No. 2 submitted that since the respondent No. 2 had prosecuted the appellant under the Negotiable Instruments Act, he had not filed any suit for the recovery of the amount covered by the cheque and because of that the respondent has suffered a huge financial loss. According to the learned counsel, the respondent No. 2 has not filed any suit for the recovery of money as he was hopefully expecting that the courts below would have convicted the appellant. There is need for making liberal use of provisions contained in Section 357(3) of Cr.P.C. while dealing with the case arising under the Negotiable Instruments Act, the trial court has to consider as to what would be the reasonable amount of compensation payable to the respondent No.2.

41. The learned appellate court was of the opinion that while imposing sentence under the provisions of the Negotiable Instruments Act, the court has to take into consideration all aspects of the case including the financial

loss caused to the payee or holder in due course of the cheque, the quantum of the amount involved in the cheque, status of the appellant as well as of the respondent, time and costs consumed in the litigation, etc.

42. In this case, the Ld. Appellate Court has noted that the trial court has not assigned any reasons whatsoever for not awarding the compensation to the respondent No.2. The learned trial court ought to have awarded adequate compensation to alleviate the distress of the respondent.

43. In the present case, it is to be noted that the cheque was issued in the year 2001. Almost 10 years have elapsed. The respondent No.2 must have suffered financially due to the non-availability of the amount due to the conduct of the petitioner in issuing cheques dishonoured.

44. The appellate court was of the view that the court below has erred in imposing a meagre fine of ₹ 5,000/- and payment of compensation of ₹ 5,000/- for the loss suffered by the respondent No.2. Accordingly, the substantive sentence of one year awarded by the Id. trial court was done away with. However, fine was enhanced to ₹ 16,40,000/-. It was

further directed that the entire fine proceeds were directed to be given to the respondent No.2 as compensation.

45. I find no discrepancy or illegality in the judgment dated 28.02.2011 passed by the learned appellate court. The learned counsel for the petitioner could not point out any illegality or infirmity in the order assed by the two courts below. I concur the same.

46. I note, vide order dated 23.03.2011, this Court had stayed the operation of the impugned order subject to the condition that the petitioner shall deposit ₹ 10 lacs with the Registrar General of this Court within four weeks from that date.

47. Vide order dated 02.06.2011, this Court has observed that neither the amount has been deposited within four weeks nor the interim order has been continued after 19.05.2011.

48. Furthermore, vide order dated 05.07.2011, CrI. M.B. No.509/2011 was dismissed and the stay of the impugned order was vacated.

49. The conduct of the petitioner is not appreciated, therefore, while dismissing the petition, I impose a cost of

₹ 50,000/- on the petitioner which shall be paid to the respondent No.2.

50. I further direct that if the petitioner does not pay the entire fine amount to the respondent No.2 within four weeks, then he shall pay 9% interest on the entire amount till the realization of the same.

51. Accordingly, the CrI Rev. P.No.126/2011 is dismissed with costs of ₹50,000/- as mentioned above.

SURESH KAIT, J

August 23, 2011
RS