

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. M.C. No. 1430/2010

% Judgment decided on: 23rd March, 2011

VEENA AHUJA

.....PETITIONER

Through: Mr. S.K. Sharma, Adv.

Versus

CENTRAL EXCISE

.....RESPONDENT

Through: Mr. Satish Aggarwala, Adv.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

- | | |
|--|-----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | Yes |

A.K. PATHAK, J. (Oral)

1. By way of present petition under Section 482 of the Code of Criminal Procedure petitioner seeks quashing of complaint case under Section 138/142 of the Negotiable Instruments Act, 1881 (for short hereinafter referred to as 'the Act') filed by the respondent, before the Additional Chief Metropolitan Magistrate, New Delhi (ACMM).

2. Respondent has alleged in the complaint that petitioner was proprietor of M/s Ahuja Battery Covers (for short hereinafter referred to as 'the firm'). On her instructions, cheque no. 135658 dated 13th May, 2005 for ₹20 lakhs drawn on State Bank of India,

Mansarovar Garden Branch, New Delhi was handed over to the respondent towards part discharge of Central Excise duty, jointly and severally due from the petitioner and her firm. On presentation, said cheque was returned dishonored by the banker of the petitioner for the reasons 'exceeds arrangements'. Since cheque amount was not paid by the petitioner within the statutory period as provided under the Act despite receipt of legal notice dated 12th July, 2005, petitioner had committed offence under Section 138 of the Act.

3. Learned counsel for the petitioner has contended that the cheque in question had not been handed over to respondent for discharging, in whole or in part, any debt or other liability. No excise duty was due and payable as on the date of issue of cheque. No demand in that regard was pending as on the said date. In fact, officials of respondent had conducted a raid at the petitioner's residence as well as her business premises on 6th May, 2005. They alleged that there were some irregularities in the payment of excise duty by the firm. Without quantifying the amount towards alleged evasion of excise duty, officials of respondent, by extending threat of arrest, collected two post dated cheques bearing no. 135656 dated 11th May, 2005 for ₹15 lakhs and 135658 dated 13th May, 2005 for ₹20 lakhs both drawn on State Bank of India, Mansarovar Garden Branch, New Delhi. These cheques were taken by the officials of the respondent without passing any assessment order or quantifying the amount

towards the excise duty. As late as on 2nd November, 2005, a show cause -cum-demand notice was issued to the firm to the effect that as to why Central Excise duty amounting to ₹46,12,318/- be not demanded under Section 11 A(i) of the Central Excise Act, 1944. It was further stated that in case no cause was shown against the action proposed to be taken, within 30 days, the case will be decided on merits without any further reference to them. Excise duty was quantified only on 2nd November, 2005. Thus, it is evident that neither any legally enforceable liability existed as on 6th May, 2005, when cheque in question was taken from the petitioner, nor it existed when the cheque was presented for payment. As per the learned counsel no offence under Section 138/142 of the Act is made out against the petitioner for this reason. Reliance has been placed on K. Narayana Nayak Vs. M. Shivarama Shetty ILR 2008 KAR 3635.

4. Per contra, learned counsel for the respondent has contended that the notice has already been framed against the petitioner by the Trial Court. Thus, petitioner can either be convicted or acquitted after the trial and the complaint cannot be quashed at this stage. His next contention is that under Section 139 of the Act a presumption arises that the cheque had been issued towards discharge of a legally enforceable liability. This presumption can be rebutted by the petitioner only in his defence, during the trial.

5. Relevant it would be to refer to Section 138 of the Act at this stage which reads as under :-

“Dishonour of cheque for insufficiency, etc., of funds in the account. 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 provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-

(a) the 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;

(b) the payee or the holder in due course. of the cheque as the case may be, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.”

(emphasis supplied)

6. A perusal of aforesaid section clearly indicates that to attract the penal consequences under Section 138 of the Act, three ingredients i.e. (i) that there is a legally enforceable debt; (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt and (iii) that the cheque so issued had been returned due to insufficiency of funds, have to be essentially met.

7. It is evident that one of the essential ingredients to attract penal consequences under Section 138 of the Act is that cheque had been issued for discharge, in whole or in part, of any legally enforceable debt or liability. Indubitably, Section 139 of the Act raises a presumption in favour of holder of the cheque that the same had been issued for discharge, in whole or in part, of any debt or other liability. But this presumption is a rebuttable presumption. It is not necessary for the accused to rebut this presumption only by leading positive evidence, that is, by stepping into the witness box or producing any other witness in his defence. This presumption can be rebutted even from the material already brought on record. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different. In other words, complainant has to prove its case beyond the shadow of reasonable doubt; whereas accused can prove his defence on the basis of “preponderance of probability”. Inference can be drawn from the material brought on record even

if the accused fails to lead any positive evidence. Supreme Court in ***Krishna Janardhan Bhat Vs. Dattatraya G. Hegde*** AIR **2008 SC 1325**, has held that an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different. It was further held that a statutory presumption has an evidentiary value. The question as to whether the presumption stood rebutted or not, must, therefore, be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the accused is not imperative.

8. In the present case, it is clear from the material placed on record that the officers of the respondent had conducted a raid at the business premises as also the residence of the petitioner on 6th May, 2005. They took in their possession certain documents. Statements of petitioner's husband and son, who had been running the business on behalf of the petitioner, were also recorded. Cheque in question was also taken. As on that date, no liability towards the excise duty was assessed as is evident from the perusal of show cause-cum-demand notice dated 2nd November, 2005 which had been issued after about six months of the issuance of cheque. It appears that on the basis of the

documents so collected, as also the statement of witnesses recorded during the intervening period, respondent had quantified a sum of ₹46,12,318/- towards the excise duty. The liability of the firm to pay this amount had not attained finality even on 2nd November, 2005 as 30 days time was granted to the firm to produce all the evidence on which it intended to rely upon in their defence at the time of showing cause. It would be relevant to refer to paragraphs 23, 26 and 27 of the show cause notice at this stage which read as under:-

“23. Now, therefore, M/s. ABC are called upon to show cause to the Addl. Commissioner, Central Excise, Delhi-II, C.R. Bldg., New Delhi within 30 days of the receipt of this notice as to why:-

- (1) Central Excise duty of ₹45,42,326/- @ 16% and education cess of ₹70,072/- @ 2% of the duty (total duty Rs. 46,12,318/-) involved on the excisable goods collectively valued at ₹2,83,89,534/-cleared by them from 01.04.02 to 31.03.05, should not be demanded under Section 11A(i) of the Central Excise Act, 1944 by invoking the extended period of five years. (as per table No. VI)
- (2) An amount of ₹22,00,000/- (Twenty two lacs only) deposited voluntarily by the party vide two cheques, referred in the foregoing paras, may not be appropriated towards realization of Central Excise duty on goods manufactured and cleared by them clandestinely under the provisions of Sec. 11A of Central Excise Act, 1944.
- (3) Penalty should not be imposed upon M/s. ABC under Rule 25 of Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.
- (4) Interest should not be demanded and recovered from them under Section 11AB of the Central Excise Act, 1944.

- (5) The seized goods (PVC resin) valued at ₹13,17,375/- should not be confiscated under Rule 25 of Central Excise Rules, 2002.

26. M/s. ABC, Sh. K.L. Ahuja and Sh. Amit Ahuja are hereby directed to produce all the evidences on which they intend to rely upon in support of their defence at the time of showing cause. They should also clearly mention in their written reply as to whether they wish to be heard in person or through their legal representative before the case is adjudicated.

27. If no cause is shown to this notice or against the action proposed to be taken within the time stipulated above, or neither they nor their legal representative appear before the adjudicating authority at the time of hearing, the case will be decided on merits, on the basis of facts already available on record, without any further reference to them.”

9. A perusal of show cause notice clearly indicates that even on 2nd November, 2005 the liability of the petitioner to pay ₹46,12,318/- towards the excise duty had not attained finality.

10. Para 8 of the reply filed by the respondent on this count also supports this fact. For the sake of ready reference para 8 of the reply is reproduced hereunder:-

“With reference to para No.4 (n), it is submitted that the case was on remand back, adjudicated by the Additional Commissioner, Delhi-II vide Order-in Original No. 56/2008-09 dated 30.1.2009, confirming the duty liabilities. Aggrieved by the said O.I.O. the party has gone in appeal in the CESTAT, New Delhi and the case is till date pending there.”

11. For the foregoing reasons, I am of the view that the cheque in question had not been issued by the petitioner in discharge of the part liability towards the excise duty as has been claimed by

Crl.M.C.No. 1430/2010 Page 8 of 9

the respondent. Since one of the essential ingredients of Section 138 of the Act is not attracted in this case, I have no hesitation to conclude that the prosecution of petitioner is bad in law and cannot be sustained. Accordingly, petition is allowed and criminal complaint under Section 138/142 of the Act titled Central Excise vs. Ms. Veena Ahuja is quashed.

A.K. PATHAK, J.

MARCH 23, 2011

ga