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

+ CRL.L.P. 171/2012

% Judgment delivered on: 27th March, 2012

S K MITTAL

..... Petitioner

Through: Mr. Mukesh Kaushik, Adv.

versus

SAREE MAHAL REG.

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

CRL. M.A. 3790/2012 (Delay)

For the reasons explained, delay stands condoned.

Criminal M.A. stands disposed of.

+ **CRL. L.P. 171/2012**

1 Vide the instant petitioner, the petitioner has assailed the impugned judgment dated 12.10.2011 whereby, learned MM rejected the complaint filed by the petitioner and acquitted the respondent /accused.

2 Being aggrieved, the petitioner preferred an appeal before Ld. District Judge, Saket and the same was withdrawn as not maintainable.

3 Ld. counsel appearing on behalf of the petitioner submits that Advocate earlier appearing on behalf of petitioner / complainant before the ld. trial court could not pursue the case of the petitioner properly and there

were so many lacunas in the case which resulted in the acquittal of the accused/respondent. Therefore, he prays that impugned judgment may be set aside and case may be ordered to be adjudicated afresh.

4 The facts of the case are that the respondent approached the petitioner for a friendly loan of Rs.2lacs and because the accused/respondent was known to him, he advanced the said loan to him.

5 It is further averred in the complaint that in order to discharge liability in relation to the aforesaid transaction, the accused/respondent issued cheque bearing number 125706 dated 16.02.2006 drawn on UTI Bank (now Axis Bank) to the complainant. However, the said cheque was returned on account of insufficiency of funds. Accordingly, the petitioner / complainant immediately informed the respondent / accused about the same but he did not respond and started avoiding the petitioner. Thereafter, he served legal notice dated 21.08.2006 on the respondent / accused despite which he neither paid the dishonored cheque amount nor replied to the legal notice. Thus, the complainant filed the present complaint under Section 138 of Act.

6 Notice under Section 251 of Cr.P.C. for the offence under Section 138 NI Act was served upon accused on 06.03.2009 to which he pleaded not guilty and claimed trial.

7 The petitioner / complainant in support of his case led his evidence by way of affidavit which is Ex CW1/1 reiterating the averments made in the complaint. The dishonored cheque is ExCW1/A.

8 The statement of the respondent / accused was recorded under Section 313 Cr.P.C. on 19.07.2010, wherein all incriminating materiel existing on record including exhibited documents were put to him to which he denied in general. He stated that he had not issued any cheque to the complainant. He

further stated that he had no liability or debt towards the complainant. He stated that he did not know the cheque in question was dishonored. He also stated that he did not receive any legal demand notice. He did not express his willingness to lead defence evidence.

9 Thereafter, the counsel for accused moved an application under Section 254 Cr.P.C. for granting opportunity to lead evidence in defence and to summon a witness from the bank of the accused. The said application was allowed.

10 Pursuant to permission one witness, Mr. Sanjeev Pandey, Asstt. Manager, Axis Bank was examined as DW1, who tendered certified copy of the account opening form as EXDW1/1.

11 It was observed by learned MM that for proving an offence under Section 138 NI Act, following ingredients are required to be fulfilled :-

- “1 That there is legally enforceable debt or liability;***
- 2 The drawer of the cheque issued the cheque to discharge in part or whole the said legally enforceable debt or liability,***
- 3 The cheque so issued was returned unpaid by the banker of the drawer.***
- 4 Legal demand notice was served upon the accused and the accused failed to make the payment within 15days of the receipt of the said notice. “***

12 Further observed that before deciding ingredient No.1 and 2, it was necessary to reproduce Section 118(a) and Section 139 of the Act which deals with the law particularly necessary to decide ingredient No. 1 and 2.

The Section 118(a) reads as under :-

“that every negotiable instrument was made or drawn for consideration and that very such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration”.

The Section 139 reads as under:-

“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, or any debt or other liability”.

13 Relevance was laid down in a case of **Ms. Narayana Menon Vs. State of Kerala AIR 2006 SC 3366** and **Hiten P Dalal Vs. Bratindra Nath Banerjee (2001) 6 SCC**, wherein it was observed as under :-

“32 Applying the definitions of ‘proved’ and ‘disproved’ to the principle behind Section 118 (a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, if either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent matter ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon”.

“.....because both Sections 138 and 139 require the Court ‘shall presume’ the liability of the drawer of the cheques for the amounts are drawn....It is obligatory on the Court to raise this presumption in every case where the factual basis for raising the presumption has 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”.

14 The standard of proof to discharge the burden shifted on accused to

rebut the presumption raised by the court under Section 139 is not the same as upon the prosecution to prove the case.

15 The accused has taken the defence that the impugned cheque has neither been issued by him nor bears his signatures.

16 In cross-examination, the complainant stated that out of the loan amount of Rs.2lacs, Rs.35,600 was given to the accused by cheque while the remaining amount was given in cash. The complainant admitted in his cross-examination that the purported transaction was carried out by of his maternal uncle Bishan Dayal @ Bichhi Ram. The complainant also admitted that the name in the impugned cheque was filled in the presence of the son of the accused by another person and that it was filled in a ink of a different colour.

17 Petitioner / Complainant did not furnish any details regarding the payment of the loan amount. He has neither produced his bank statement of the relevant period showing payment of amount of Rs.36,500/- by cheque nor any other document reflective of the part-payment in cash.

18 Further, nowhere in the complaint has ever mentioned that the payment was partly by cheque and partly by cash. The said fact has come out for the first time in the cross-examination of the complainant. Even the date of the alleged transaction has nowhere been brought out clearly and complainant could not recollect the exact date of loan transaction, when specifically asked about the same by the opposite party in cross examination.

19 It was only in the cross-examination that the complainant stated for the first time that a major role was played in the alleged transaction by the maternal uncle of the complainant. However, the complainant did not summon his maternal uncle namely Mr. Bishan Dayal @ Bichhi Ram to depose in support of his case. In a similar fact situation, Hon'ble Supreme

Court in a case of **C. Antony Vs. KG Ragavan Nair 2002(4) RCR (Crl)750**

observed as follows :-

“.....it is to be seen that the trial court came to conclusion that non-examination of advocate Vijay Kumar was fatal to the case of complainant/respondent because it is the case of respondent that he came to know the appellant through said Vijay Kumar and amount was paid in the office of said Vijay Kumar.....we also think this was a very necessary piece of evidence to establish the fact that respondent had in fact advanced as sum...”

20 Further observed that the non-examination of the maternal uncle of the complainant proved fatal to the case of the complainant that money in the sum of Rs.2,00,000/- was lent to accused. It is a noteworthy fact that the complainant admitted that the name in the cheque Ex.CW1/A was filled in the presence of the son of the accused by another person in a different coloured ink. This goes on to show that the cheque was not handed over to the complainant by the accused himself and it is highly improbable and strange for complainant to have got the name of payee filled in by another person than the accused himself.

21 The complainant in his cross examination also admitted that the name of the payee in the cheque Ex.CW1/A was not in the handwriting of the accused. No reasonable or prudent man can be expected to issue a cheque filled in on all other particulars except the name of the payee. It is particularly so when the drawer of the cheque know that the cheque is being issued to a particular person for repayment of a particular amount. The complainant in his cross examination stated that the loan was advanced in January or February, 2006. However, he could not recollect the exact date.

The impugned cheque is dated 16.02.2006 and the complainant failed to prove either the duration of the alleged friendly loan or the fact as to why a cheque of the same month as that of the advancement of alleged friendly loan was accepted by him. It makes the claim of the complainant doubtful.

22 Dw1 Mr. Sanjeev Pandey, Asstt. Manager, Axis Bank was called with the samples signatures of the account from which the impugned cheque was purportedly issued. Bare perusal of this document produced by DW1 i.e. Ex. Dw1/1 reveals that the sample signature of accused on the bank document is completely different from the signature on the impugned cheque.

23 As learned counsel for the petitioner submitted that during trial, the then counsel for the petitioner has not taken appropriate steps. At that stage, learned counsel should have sought permission from the learned trial court to get the hand writing verified and as to who had issued the cheque and made his signatures.

24 I am of the considered opinion that this type of grievance ought to have been raised by learned counsel in the trial court only and not after the full trial of the case and when the trial court has reached to a particular conclusion. This court find no reasons to set-aside the impugned order and direct the trial court to adjudicate the case a fresh.

25 More so, the petitioner has failed to prove that he had advanced loan to respondent and in what manner. Also failed to prove the cheque in question issued by the respondent. The material witnesses i.e. Bishan Dayal @ Bicchi Ram also not examined. The trial court has perused the

complaint considered the evidence on record and discussed the relevant provisions of laws.

26 In the light of above discussion, I do not find any infirmity or discrepancy in the impugned order passed by learned trial court. Accordingly, the instant petition is hereby dismissed.

27 No order as to costs.

SURESH KAIT, J

MARCH 27, 2012

j/jg