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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.L.P. No.164/2012**

% Judgment delivered on: 23rd March, 2012

S S CHOUHAN

..... Petitioner

Through : Mr. Deepak Sabharwal, Adv.

versus

STATE & ANR

..... Respondent

Through : Ms. Rajdipa Behura, APP for
State/R-1.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

Crl.M.A.No.3666/2012(exemption)

Exemption is allowed subject to just exceptions.

Criminal M.A. stands disposed of.

+ **Crl. L.P. 164/2012**

1. Vide the instant petition, petitioner has sought leave to appeal to the appellant against the judgement dated 04.01.2012, whereby respondent no. 2 has been acquitted from the complaint being filed by the petitioner under Section 138 N.I. Act.

2. Learned counsel appearing on behalf of the appellant submits that the Trial Court has not considered the evidence on record, which is in favour of the appellant, and has passed the impugned order on presumptions and conjecture. The respondent No.2/accused had to prove his innocence not the petitioner/complainant his complaint and allegations therein. Therefore, the impugned judgment is perverse and

bad in law.

3. As recorded by ld. Trial Judge in its impugned judgment mentioned above, in March 2007, the respondent no. 2 had approached the petitioner and sought a loan of Rs. 80,000/- for the marriage of his daughter. Keeping in view, the cordial relationship between petitioner and respondent no. 2 and the assurance of respondent no. 2 that the loan would be returned, shortly, accordingly petitioner had advanced a loan of Rs. 80,000/- to respondent no. 2, by way of cash on 23.03.2007.

4. After receiving the loan, respondent no.2 had delayed the repayment of the loan on one pretext or the other. In 2009, when the petitioner once again approached respondent no. 2 for repayment of the loan, he had handed over a cheque bearing no. 865164 dated 23.03.2009, drawn on State Bank of India, Rail Bhawan, New Delhi to the petitioner.

5. On presentation, the said cheque was dishonoured. Accordingly, petitioner sent legal notice to the respondent no. 2 on 31.03.2009. Thereafter, filed the complaint before the trial court.

6. During trial, petitioner / complainant examined himself by way of his affidavit Ex. CW1/A and documents, Ex. CW1/1 to Ex. CW1/4. In cross-examination, petitioner stated that he knew respondent no. 2 since the past 20 years. The petitioner also admitted that he had retired from RBI in 2004; that he had filled up the details viz. amount and date in the cheque no. 865164; that he had no proof of granting the loan of

Rs. 80,000/- to the respondent no. 2 and that earlier he had filed a case against Sh. Rajesh Kanojia for Rs. 1 lac and compromised with him after the passing of decree, by accepting Rs.56-58,000/- in lieu of Rs. 1 lac.

7. The petitioner denied that he had received the cheque 865164 from the accused in lieu of a loan of Rs.12,500/- granted to respondent in 2005. The petitioner further denied that he was in the business of money lending; that he had in the habit of harassing his creditors by refusing to return back the promissory notes / blank cheques signed by them; that he had withdrawn any amount from the account of respondent no 2 at RBI Staff Co-Operative Thrift and Credit Society Ltd. and further denied that he did not serve any demand notice to respondent no. 2 and also denied that he received Rs. 33,000/- in lieu of Rs. 12,500/- and that he falsely implicated respondent no. 2 in the present case.

8. During examination under Section 313 Cr.P.C., respondent no. 2 denied that he had issued any cheque mentioned above in favour of the petitioner. Also respondent no. 2 denied that he had been served with the legal notice dated 25.03.2009, Ex CW1/3 by way of registered post with acknowledgment due. Upon being asked to explain the filing of the present case against himself, he accused stated as under:

“It is a false case.

...

I am innocent and has been falsely implicated by the complainant in this case. I had given the signed blank cheque to the complainant and other details on the cheque

was not filed by me. The complainant had withdrawn Rs.20,000/- from the society of Reserve Bank Employees from my account out of which Rs. 12,500/- remained balance on me. The cheque in question was given in lieu of the same the said amount. The present case is a false one filed by the complainant.”

9. In support of his case, respondent no. 2 examined DW1, Sh. Rajinder Malhotra, Supervisor of RBI Staff Co-Operative Thrift and Credit Society Ltd. The said witness produced the withdrawal slip, Ex. DW1/A of respondent no. 2. The withdrawal slip, Ex. DW1/A indicated that petitioner had withdrawn Rs. 15,000/- from the account of respondent no.2 at RBI Staff Co-Operative Thrift and Credit Society Ltd on 08.01.2007.

10. During cross-examination, DW1 Sh. Rajinder Malhotra, denied having any knowledge about the amount due between the parties. Also, DW1 Sh. Rajinder Malhotra denied having knowledge about the relation between the present case and the withdrawal slip, Ex. DW1/A.

11. Ld. Trial Judge, after hearing both the parties and after perusing the record, find that the statement made by the respondent no. 2 while examination under Section 313 of Cr.P.C. read with Section 20 of the NI Act, 1881 establishes that respondent no. 2 had drawn the cheque 865164 Ex.CW1/1 in favor of the petitioner on an account maintained by him with State Bank of India, Rail Bhawan, New Delhi-01.

12. The testimony of CW1, Sh. Sukhdev Singh Chauhan/petitioner, supported with cheque mentioned above as Ex.CW1/1 and dishonor memo dated 25.03.2009, Ex.CW1/2 establishes that the cheque

mentioned above was presented by the petitioner through Central Bank of India and was returned unpaid by the banker of respondent no. 2 i.e. State Bank on India, on 25.03.2009 due to “Insufficient Funds” in the account of respondent no. 2.

13. Ld. Trial Judge has dealt issue regarding service of legal notice dated 28.03.2009, Ex. CW1/3, and finds that it expedient to refer to Section 114, Illustration (f) of the Evidence Act, 1872, Section 27 of the General Clauses Act, 1897.

14. Ld. Trial Judge further find that respondent no. 2 had not brought any credible evidence to rebut the presumptions provided in Section 114, Illustration (f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897.

15. Therefore, it does not discharge burden upon him on account of the presumptions drawn in Section 114, Illustration (f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897.

16. In respect of the substantive defence raised by respondent no. 2 that he had not received Rs. 80,000/- from the petitioner and the aforementioned cheque was issued in relation to a previous transaction, he establishes two issues as under:

(a) Whether the accused has rebutted the presumptions provided provided under Section 118(a) and Section 139 of the NI Act, 1881?

(b) If yes, whether the complainant has been able to

establish beyond reasonable doubt that the accused had committed the offence described under Section 138 of the NI Act, 1881?

17. After going through the evidence on record, Id. Trial Judge was of the opinion that respondent no. 2 rebutted the presumption provided under Section 118(a) and Section 139 of the NI Act, 1881 by denying that he had received Rs. 80,000/- from the petitioner; by eliciting testimony from the petitioner / complainant that he had no proof of payment of Rs. 80,000/- to the respondent no. 2; by eliciting testimony from the petitioner / complainant that he had filled up the amount and date in the cheque 865164 Ex.CW1/1 and by demonstrating that during cross-examination, the petitioner / complainant had falsely testified regarding the previous loan transaction between the parties as well as the withdrawal of money by the petitioner / complainant from the account of the respondent No.2/accused at RBI Staff Co-Operative Thrift and Credit Society Ltd.

18. Therefore, Id. Trial Judge further recorded that all the aforesaid circumstances/factors rebut the presumptions provided under Section 118(a) and Section 139 of the NI Act, 1881 because they raise credible doubt over the veracity of the petitioner / complainant and satisfy the test of 'rebuttal on the strength of preponderance of probabilities'. Therefore, he decided the first question in favour of the respondent no.2 and hold that he has legitimately rebutted the presumptions provided under Section 118(a) and Section 139 of the NI Act, 1881.

19. Ld. Trial Judge in respect of the second question found that both

the parties to this case have failed to prove their respective cases. The petitioner/complainant has not brought on record any credible evidence to demonstrate that he had actually granted a loan of Rs.80,000/- to respondent no. 2 and received the cheque 865164 in lieu of the said loan. Correspondingly, the respondent no. 2 has also not brought any credible evidence to prove that he had issued the cheque 865164 in respect of the previous loan transaction i.e. in 2005. Respondent no. 2 could have easily proved the said fact by either producing his account statement or by examining a witness from State Bank of India, Rail Bhawan, New Delhi and showing that any cheque subsequent to cheque no. 865184 i.e. cheque no. 865185 or 865186 had been encashed in 2005 or 2006. Also, the respondent no. 2 has not offered any explanation regarding the non-filing of any FIR/complaint against the petitioner / complainant, once the petitioner / complainant had refused to hand over the cheque 865164 to the respondent no.2 upon receipt of the previous loan amount of Rs. 12,500/- alongwith interest. Accordingly, opined that the said loopholes in the defence of the respondent no. 2 would have assumed relevance, only if the petitioner / complainant would have produced proof of payment of Rs. 80,000/- to the respondent no. 2 and refrained from making false testimony during cross-examination.

20. The law has been settled in **K.John v Tom Vargese & Anr : JT 2007 (13) SC 222** wherein the Apex Court has observed as under:-

“10.... The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of act that the complainant did not approach the court with clean hands. His conduct was not that of a

prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay instalments in respect to the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of a proof cast on him under Section 139 of the Act, no exception thereto can be taken.”

21. In another case **Krishna Janardhan Bhat v. Dattatraya G. Hegde**: AIR 2008 SC 1325 the Supreme Court has held as under:-

20. Indisputably, a mandatory presumption is required to be raised in terms of Section 118(b) and Section 139 of the Act. Section 13(1) of the Act defines “negotiable instrument” to mean a promissory note, bill of exchange or cheque payable either to order or to bearer .

Section 138 of the Act has three ingredients, viz.:

(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 pre-supposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

21. The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

22. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

23. 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 records. 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.

24. [In Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal](#) [(1999) 3 SCC 35] interpreting Section 118(a) of the Act, this Court opined:

Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of

negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt.

25. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is “preponderance of probabilities”. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies.

26. A statutory presumption has an evidentiary value. The question as to whether the presumption whether 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 appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

27. In M.S. Narayana Menon Alias Mani v. State of Kerala and Another [(2006) 6 SCC 39], it was held that once the accused is found to discharge his initial burden, it shifts to the complainant.

28. Four cheques, according to the accused, appear to have been drawn on the same day. The counterfoil of the cheque book, according to the appellant, was in the handwriting of R.G. Bhat wherein it was shown that apart from other payments, a sum of Rs. 1500/- was withdrawn on a self- drawn cheque. The courts below proceeded to hold that the defence raised by

the appellant has not been proved, which, in our opinion, is not correct. He did not know that the said cheque had not been encashed. He replied to the notice thinking that one of the cheque has been misused. There is nothing on record to show that he knew that one of the cheques was still with R.G. Bhat.

29. Disputes and differences between him and R.G. Bhat stood established by admission of the respondent himself. Similar industry was being run by R.G. Bhat although he was acting as the constituted attorney of the appellant. According to the appellant, R.G. Bhat had cheated him. The counterfoil showed that not more than Rs. 20,000/- had ever been withdrawn from that bank at a time. The courts were required to draw an inference as to the probability of the complainant s advancing a sum of Rs. 1.5 lakhs on mere asking and that too without keeping any documentary proof. Even there was no witness. The purported story that the appellant would himself come forward to return the amount by a cheque knowing fully well that he did not have any sufficient funds is difficult to believe.

*30. [In K. Prakashan v. P.K. Surenderan](#) [2007 (12) SCALE 96], this Court following M.S. Narayana Menon (*supra*) opined:*

“12. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in

nature. Having regard to the definition of terms proved and disproved as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-à-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

13. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability. [In John K. John v. Tom Varghese & Anr.](#) [JT 2007 (13) SC 222], this Court held:

“10 The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay installments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits.

The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken.

31. Mr. Bhat relied upon a decision of this Court in [Hiten P. Dalal v. Bratindranath Banerjee](#) [(2001) 6 SCC 16] wherein this Court held: 22 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 exist, no 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 exist. 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.

[See also [K.N. Beena v. Muniyappan and Another](#) (2001) 8 SCC 458]

32. We assume that the law laid down therein is correct. The views we have taken are not inconsistent therewith.

33. But, we may at the same time notice the development of law in this area in some jurisdictions. The presumption of innocence is a human right. [See *Narender Singh & Anr. v. State of M.P.* (2004) 10 SCC 699, [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr.](#) (2005) 5 SCC 294 and *Rajesh Ranjan Yadav @ Pappu Yadav v. CBI* through its Director (2007) 1 SCC 70] Article 6(2) of the European Convention on Human Rights provides : Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law . Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasized.

It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g., honest and reasonable mistake of fact. In a recent Article The Presumption of Innocence and Reverse Burdens : A Balancing Duty published in [2007] C.L.J. (March Part) 142 it has been stated :-

In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.

34. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say

how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

22. After hearing Id. Counsel for the petitioner and on perusal of the judgment, keeping in view the settled law discussed above and the facts and circumstances of the present case, I find no discrepancy in the order passed by Id. Trial Judge. Accordingly, I am not inclined to interfere with the same and concur with the same.

23. CrI. L.P. 164/2012 is accordingly dismissed.

24. No order as to costs.

SURESH KAIT, J

MARCH 23, 2012

Jg