

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.L.P. 95/2006**

Decided on 01.08.2013

IN THE MATTER OF :

SATISH KUMAR

..... Petitioner

Through: Mr.Jitin Sahni, Advocate

versus

STATE NCT OF DELHI & ANR

..... Respondents

Through: Mr.Naveen Sharma, APP for State

Mr.Arun Aggarwal, Advocate for R-2

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J. (Oral)

1. The present petition has been filed by the petitioner/complainant under Section 378 Cr.PC craving leave to assail the judgment dated 28.3.2006 passed by the learned ASJ in CrI.A. 3/2006, whereby the order on conviction dated 6.12.2005 and order on sentence dated 18.1.2006 passed by the learned MM in CC No.136/1/02 were set aside and the respondent No.2 was acquitted of the offence under Section 138 of the of the Negotiable Instruments Act.

2. The brief facts of the case as set out by the petitioner in the complaint filed by him under Section 138 of the Negotiable Instruments Act(for short '**the Act**') are that in the month of December 2001, he had advanced a loan of ₹72,000/- to the respondent No.2 and the latter had promised to return the loan amount in the first week of January 2002. The respondent No.2 had allegedly issued a cheque bearing No.958882 dated 4.1.2002 for a sum of ₹72,000/- drawn on Bank of Maharashtra, Vivek Vihar in favour of the petitioner towards the discharge of his liability. However, as per the memo dated 15.3.2002, issued by the bankers of the petitioner, when he had presented the said cheque for encashment, the same was dishonoured and returned on account of insufficient funds. Thereafter, the petitioner had issued a legal notice dated 26.3.2002 to the respondent No.2 demanding the aforesaid amount. Respondent No.2 had replied to the said legal notice and had stated that the cheque in question had been stolen and he had lodged a complaint with the local police in that regard and further, that he had informed his bankers to stop payment of the said cheque by sending a written intimation to that effect.

3. The petitioner then filed a complaint the against the respondent under Section 138 of the Act on 27.4.2002. In the course of the trial, the complainant had examined himself as CW-1 and the clerk of Bank of Maharashtra as CW-2. The accused had examined himself as DW-1. He had

also examined two other witnesses, Sh.Dewan Singh, clerk from Bank of Maharashtra as DW-2 and his wife, Smt.Anita Modi, as DW-3. After examining the evidence brought on record and hearing the counsels for the parties, the learned MM had allowed the complaint of the petitioner vide judgment dated 6.12.2005 and had convicted the respondent No.2 for the offence under Section 138 of the Act. As per the order on sentence, the respondent No.2 was awarded simple imprisonment for a period of one year and directed to pay compensation of ₹72,000/- to the petitioner, apart from paying him litigation charges of ₹2,000/-

4. Aggrieved by the aforesaid order of conviction and order on sentence, the respondent No.2 had preferred an appeal. By the impugned judgment dated 28.03.2006, the appellate court arrived at the conclusion that the petitioner/complainant had not been able to prove his case against the respondent No.2 beyond reasonable doubt having failed to establish that there was any consideration for the cheque issued by the respondent No.2 in favour of the petitioner and further, on account of the failure to prove the three sources of the amount that had allegedly been advanced as loan to the respondent No.2. Resultantly, the impugned order dated 6.12.2005 passed by the learned MM was set aside by the appellate court and the respondent No.2 was acquitted for the offence under Section 138 of the Act.

Aggrieved by the aforesaid acquittal order, the petitioner/complainant has filed the present petition for seeking leave to file an appeal.

5. Learned counsel for the petitioner/complainant has assailed the impugned judgment on two counts. The first ground taken by him is that the appellate court had erred in overlooking the observations made by the learned MM in his judgment to the effect that there were some business dealings between the petitioner and the respondent No.2 and therefore, there was enough reason to believe that the cheque in question had been issued by the petitioner in favour of the respondent No.2 for valuable consideration. The second plea taken by the learned counsel is that the respondent no.2 had failed to explain that if the cheque in question had been lost in November 2001, then why were directions issued by the respondent to his bankers to stop payment thereof as late as in January 2002.

6. This Court has heard the counsels for the parties and carefully perused the impugned judgment in the light of the evidence placed before the trial court and the arguments advanced.

7. It is a settled legal position that under the scheme of Negotiable Instruments Act, a statutory presumption has been created in favour of the holder of the negotiable instrument in due course. Section 139 stipulates that the Court shall presume liability of the drawer of the cheque for the

amount for which the cheque is drawn and Section 118 envisages that unless the contrary is proved, it shall be presumed that the negotiable instrument including a cheque has been drawn for consideration [Ref: **(2001) 6 SCC 16** entitled Hiten P. Dalal vs. Bratindranath Banerjee]

8. Although the Court is under an obligation to raise the presumption contemplated under Sections 118, 138 and 139 in every case, where the factual basis for raising the presumption has been established by the complainant, the accused is required to raise a probable defence or rebut such a presumption by leading evidence or bringing such facts on record in the cross-examination of the complainant that could make the latter's case improbable. For doing so, it is not necessary for the accused to disprove the existence of consideration by way of direct evidence. The standard of proof has been held to be preponderance of probabilities and the inference of preponderance of probabilities can be drawn not only from the materials that have been placed on record, but also by reference to the circumstances upon which the accused relies. (Ref: **AIR 1999 SC 1008** entitled Bharat Barrel and Drum Manufacturing Company vs. Amin Chand Payrelal) If the accused is proved to have discharged the initial onus of proof placed on him by showing that the existence of consideration was improbable or doubtful or illegal, then the onus will shift back to the complainant who will then be

under an obligation to prove it as matter of fact and failure to do so will disentitle him to any relief on the basis of the negotiable instrument.

9. Records reveal that the appellate court has overturned the order of conviction dated 06.12.2005 passed by the learned MM by relying on the deposition of the clerk from Bank of Maharashtra, who was summoned by both, the petitioner/complainant as CW-2 as also the respondent No.2/accused as DW-2. The aforesaid witness had deposed on 18.01.2002, that a letter had been received by the bank from the respondent No.2 much prior to 15.3.2002, the date of dishonour of the cheque, requesting *inter alia* that payment of the cheque in question be stopped. In his cross-examination, CW-2 had explained that as per the software installed in the bank computer, if there is sufficient balance in the account of an account holder only then are the stop payment instructions regarding a particular cheque followed by the computer. But in case the funds are already insufficient, then the computer will not issue stop payment instructions. When CW-2 was summoned as a defence witness by the respondent No.2/accused, and he appeared as DW-2, he had admitted in his deposition that the bank could not trace out another letter dated 3.2.2002 issued by the respondent No.2 calling upon it to stop payment of the cheque dated 03.03.2002 but the said witness had admitted the copy of the said letter marked as DW-1/D and he had stated that payment of the disputed cheque

was stopped by the bank, and a sum of ₹10/- was deducted from the account of the respondent No.2 for stopping the payment. The statement of account of the respondent No.2 showing the aforesaid entry is marked as DW-2/B.

10. Taking into consideration the deposition of the clerk from the bank (CW-2 and DW-2), the appellate court arrived at the conclusion that there were sufficient funds in the account of the respondent No.2 on the date, when the cheque in question was presented for encashment and that being the position, it could not be stated that the cheque was returned on the said date due to insufficiency of funds. The appellate court also took into consideration the legal notice dated 26.03.2002 (Ex.CW1/C) issued by the petitioner/complainant to the respondent No.2 demanding payment of the sum of ₹72,000/- and the reply to the said notice sent through the respondent No.2's counsel (Ex.DW1/H). In his reply, the respondent No.2 had duly stated that intimation of the disputed cheque going missing had been conveyed to his banker vide letter dated 18.01.2002 and a reminder had also been issued on 03.02.2002 and besides the above, a report in this regard was lodged with Police Station: Surya Nagar, Ghaziabad. The aforesaid explanation answers the objection taken by the counsel for the petitioner/complainant that the respondent No.2 had failed to explain that if the cheque in question had been lost in November, 2001 then why were

instructions issued by him to his banker to stop payment of the said cheque in January, 2002. Evidence on record reveals that appropriate instructions were issued by the respondent No.2 to his banker for stopping the payment of the cheque in question well before the legal notice demanding payment was issued by the petitioner/complainant on 26.03.2002 and further, CW-2/DW-2 had also confirmed the fact that there were sufficient funds in the account of the respondent No.2 on the date, when the cheque in question was presented to his banker for encashment, but the said cheque was returned due to prior instructions issued by the respondent No.2 calling upon his bank to stop payment in respect thereof.

11. Another relevant point that weighed in favour of the respondent No.2 was that his applications for summoning the police report with regard to the missing cheque and one witness, Brahm Singh, before whom the alleged loan was stated to have been given, were rejected by the trial court but at the time of passing the judgment, the learned MM found himself in a dilemma as to whether the petitioner had been able to prove his case against the respondent No.2 beyond reasonable doubt. In any case, the standard of proof for the accused is preponderance of probabilities as he is not required to prove his defence beyond reasonable doubt [Ref: **2008 Cri.L.J. 1172** entitled Krishna Janardhan Bhat vs. Dattatraya G. Hegde and **(2009) 2 SCC 513** entitled Kumar Exports vs. Sharma Carpets]. As rightly

observed by the learned ASJ, once the burden of showing the existence of a reasonably probable defence in his favour was discharged by the respondent No.2, then the presumption under Section 118 of the Negotiation Instruments Act disappears and in such circumstances, the case has to be decided on the basis of the evidence adduced by both the parties on record.

12. The last contention of the counsel for the petitioner/complainant is that the appellate court had erred in overlooking the observations made by the learned MM in his judgment that there were some business dealings between the parties and that was sufficient reason to believe that the cheque in question had been issued by the respondent No.2 in favour of the petitioner for valuable consideration. A perusal of the impugned judgment reveals that in his cross-examination, the petitioner had revealed three sources from where he had arranged the sum of ₹72,000/- for allegedly extending a loan to the respondent No.2, which included a sum of ₹25,000/- taken from his father, some money lying in his house and some money withdrawn from his bank. However, CW-2, the clerk summoned by the petitioner from the bank had produced the records that had failed to show withdrawal of any amount by the petitioner from his bank at the relevant time

13. The aforesaid fact was also noticed by the learned MM in his judgment, but no adverse inference had been drawn against the petitioner on that

basis. However, the appellate court did notice this oversight by the trial court and had observed that the petitioner had failed to produce any document of his income or his financial position to show that he was capable of advancing a friendly loan of ₹72,000/- to the respondent. The petitioner/complainant having failed to prove that he had a financial capacity to extend the loan amount to the respondent, the obvious conclusion would then be that the respondent had succeeded in rebutting the presumption under Section 118 (a) and Section 139 of the Negotiable Instruments Act and he had successfully proved that the cheque in question had not been issued in discharge of any legally enforceable debt or liability.

14. This Court finds some merit in the observation made by the learned ASJ that the petitioner had not been able to prove any one of the three sources of money though he had specifically mentioned the same in his deposition. In fact failure on his part to prove any entry in his bank account showing withdrawal of any amount during the relevant period created a reasonable doubt about the consideration for the cheque in question. It is relevant to note that all the defences that the respondent No.2 had taken in his reply to the legal notice issued by the petitioner were put in the cross-examinations of the petitioner (CW-1) and the clerk from the bank (CW-2) but the petitioner had failed to produce any document of his income or establish that he was capable of advancing a friendly loan of ₹72,000/- to

the respondent No.2. The appellate court was therefore justified in observing that when the petitioner was fully aware of the defences taken by the respondent No.2, he ought to have proved his case beyond reasonable doubt.

15. It is in the aforesaid context that the learned ASJ had concluded that the petitioner/complainant had failed to prove his case against the respondent No.2 beyond reasonable doubt and therefore respondent No.2 ought to have been acquitted for the offence under Section 138 of the Negotiable Instruments Act. This Court is inclined to concur with the decision of the appellate court of overturning the judgment of the learned MM. The said decision is based on a logical appreciation of the evidence placed on record. In fact, the learned trial court had erred in concluding that the respondent No.2 had not been able to discharge the initial onus placed upon him to show the existence of a reasonably probable defence in his favour. On the contrary, the records summoned by the respondent No.2 from his bank and the deposition of DW-2 (clerk from the Bank) were themselves sufficient to hold that the respondent No.2 had been able to raise a plausible defence and the notices issued by him to his banker on 18.1.2002 and 3.2.2002 much prior to issuance of the demand notice issued by the petitioner on 26.3.2002, also substantiated the said defence. However, once the burden of proof had shifted back to the

petitioner/complainant, he was unable to prove his case beyond reasonable doubt by establishing the source of the alleged friendly loan extended to the respondent No.2, thus disentitling him to the grant of relief on the basis of the negotiable instrument.

16. In view of the aforesaid facts and circumstances, this court is of the opinion that there is no illegality, arbitrariness, perversity or misappreciation of facts in the impugned judgment, for granting leave to the petitioner to assail the same in appeal. The leave petition is accordingly dismissed.

HIMA KOHLI, J

AUGUST 01, 2013
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