

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

Date of decision: 12th March, 2013

+ **CRL.L.P. 319/2012**

VIKAL BUSINESS CORPORATION Petitioner
Through: Ms. Geeta Mehrotra, Adv.

versus

BISHAN DAS & ANR Respondent
Through: Mr. Parminder Singh Goindi, Adv.
along with Respondent in person.

+ **CRL.L.P. 320/2012**

VIKAL BUSINESS CORPORATION Petitioner
Through: Ms. Geeta Mehrotra, Adv.

versus

BISHAN DAS & ANR Respondent
Through: Mr. Parminder Singh Goindi, Adv.
along with Respondent in person.

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CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. These four Leave Petitions arise out of the four separate judgments of even date 20.03.2012 passed by the learned Metropolitan Magistrate ('MM') in four complaint cases under Section 138 of Negotiable Instruments Act, 1881(the Act) whereby Respondent No.1 was acquitted for having issued four cheques No.508824 dated 19.04.2008 for ₹5,013/-, Cheque No.508822 dated 17.04.2008 for ₹11,083/-, Cheque No.508821 dated 19.04.2008 for ₹18,276/- and Cheque No.508825 dated 16.04.2008 for ₹14,763/- all drawn on Canara Bank, Bhogal, New Delhi, which were dishonoured on presentation on account of insufficient funds and the Respondents allegedly failed to make the payment within the statutory period even inspite of notice under Section 138 of the Act.
2. As per the averments made in the Complaints the abovesaid four cheques were issued by Respondents No.1 and 2 in favour of the Petitioner Vikal Business Corporation towards the amount due from them. The cheques

were presented to Allahabad Bank, Nehru Place Branch of the Petitioner. The same were returned unpaid with the written memo dated 21.04.2008 by Canara Bank, Bhogal with the reason “Funds Insufficient”.

3. The Respondents pleaded not guilty to the notice issued under Section 251 of the Code of Criminal Procedure, 1973 (‘the Code’). The Petitioner examined Vaibhav Kalra, its Authorized Representative to prove various documents. On appreciation of evidence, the learned ‘MM’ found that the Petitioner had failed to prove that the cheques were issued in discharge of any part or whole of the liability of the drawer. Thus, the Respondents were acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (the Act). In paras 12 to 21 of the impugned judgment which are same in all the four complaint cases (except the amount of the cheque), the learned MM had given the detailed reasons for acquitting the Respondents for the offence punishable under Section 138 of the Act. The same are extracted hereunder:

*“12. It is the **case of the complainant** that the accused issued the impugned cheque to the complainant to discharge his liability towards the sum due. The cheque got dishonored on presentation. The complainant got a legal demand notice served upon the accused but the accused failed to make payment of cheque amount despite service of legal demand notice and hence, this complaint.*

13. The complainant through his complaint, affidavit, the dishonored cheque, returned memo and legal demand notice has created a factual basis to raise dual presumptions under Section 139 of the Act i.e. issuance of cheque for legally enforceable liability in whole or in part or any other liability and of the existence of legally enforceable debt/liability as such.

*14. To the case of the complainant, it is the **defence of the accused**, First that, the impugned cheque was issued to the complainant as advance payment for purchase of paper which was*

never supplied to him and Second, that the impugned cheque was not issued to discharge any liability of the accused firm and therefore, offence u/s 138 of the Act is not made out against him.

15. To establish his innocence and rebut the presumptions against him, accused duly cross examined the complainant. CW1 in his cross examination denied the suggestion that the impugned cheque was issued as advance payment towards supply of papers to accused which were not supplied. CW1 admitted that the complainant did not raise any invoice/bills against the accused firm i.e. Apex Printers, on whose account the impugned cheque is drawn.

It is the argument of the defence counsel that there are stark contradictions in the case of the complainant as averred in the complaint and as testified in the cross examination of CW1.

16. At this stage, the case of the complainant regarding the liability of accused as averred in the complaint is required to be reproduced. Para 2 of the complaint is reproduced below:

“that the accused issued a cheque no. 508824 dated 19.04.2008 for Rs.5,013/drawn on Canara Bank, Bhogal, New Delhi, in favour of the complainant, Vikal Business Corporation towards the amount due from them.”

It is the case of the complainant as per complaint that the impugned cheque was issued by accused for discharge of legal liability of his own firm i.e. M/s Apex Printers and Stationers. Contrary to this averment, CW1 in his cross examination testified that complainant did not raise any bills/invoices against the accused firm i.e. Apex Printers. A relevant portion of the cross examination is pertinent to be reproduced for better appreciation of the argument of the defence counsel. The relevant portion is as follows:

“The complainant was in business dealings with M/s Apex Arts, 28 Bhogal Road, New Delhi and not with Apex Printers and Stationers. Complainant did not raise bills/invoices against Apex Printers. Voluntarily accused always issued cheques in the name of Apex Printers and

Stationers but his firm Apex Arts used to be in business dealings with us.”

17. Perusal of the aforesaid excerpt of the testimony of CW1 manifestly reveals that complainant admittedly did not have any business dealings with the accused firm i.e. M/s Apex Printers and the impugned cheque was issued by the accused to discharge the liability of one of his another firm M/s Apex Arts. This testimony of CW1 is thoroughly incongruent with the claim of the complainant in complaint and affidavit tendered in evidence.

*18. At this stage, the following observations of the Hon'ble Supreme Court in the case titled **Rangappa Vs. Sri Mohan (2010) 11 SCC 441** are befitting:*

*“28. in the absence of compelling justification, reverse onus clause usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof in doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubt about the existence of legally enforceable debt or liability, the prosecution can fail. **As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.**”*

19. In view of the explicit admission of CW1 that the impugned cheque was not issued by accused for discharge of the liability of his proprietorship firm M/s Apex Printers (the accused firm) but for discharge of liability of another firm i.e. M/s Apex Arts; in absolute contradiction to the assertions in the complaint and affidavit, the dual presumptions under Section 139 of the Act stand rebutted. Moreso, the same consequence also follows because of the failure of complainant to seek relief under Section 138 of the Act against the accused for discharge not of his own liability for M/s Apex Printers but for M/s Apex Arts i.e. Issuance of cheque for discharge of 'other liability' permitted under the Act.

20. *It is the argument of the defence counsel that the present complaint is vague and bereft of necessary clarity and details of the transactions between the parties on the basis of which the amount of impugned cheque was liquidated. To appreciate the argument of defence counsel, it is befitting to quote Hon'ble High Court of Delhi in case titled **Pine Product Industries & Anr. Vs. M/s R.P. Gupta & Sons 2007 I AD (Delhi) 433:***

“6. The Ld. Counsel for petitioner submitted...that no details whatsoever have been indicated as to what the liabilities were, what were the 'amounts' for which the said cheque was issued for part payment, on which dates the amounts were taken by the petitioner. Nor were the exact amount taken by petitioner mentioned.

...

12. In the present case, I find that ... apart from this, there is no mention in the complaint as to when the amounts were or amount was paid, what was the rate of interest, what was the extent of the goods which were supplied and adjusted against the complainant. ... All these details are conspicuously absent. The petitioner has been convicted and sentenced on the vague and bald allegation that cheque of Rs. 3,15,000/had been issued by the petitioner in discharge of liabilities of repayment of amounts taken by him. This is the only statement contained in the complaint and no further details are forthcoming even in the evidence led by complainant.

13. In these circumstances, I hold that the courts below have grossly erred in law in concluding that the petitioner was unable to rebut the presumption raised under Section 139. Since, the conviction and sentence have been raised merely on the petitioner's alleged inability to rebut the presumption and there is nothing available on record to establish the complainant's case, I am of the view that the petitioner is entitled to acquittal.”

The present set of facts are similarly placed as that of the facts of the aforesaid judgment to the extent that the present complaint also

does not clarify the transactions and liability on the basis of which the accused issued the impugned cheque to the complainant.

*21. In the opinion of the court, the aforesaid discussion goes on to establish that accused has rebutted the dual presumptions of law raised against him by the court. At this stage, the burden of proof again shifts to the complainant. Hon'ble Supreme Court in case titled **M.S. Narayana Menon (Supra)** held that once the accused is found to discharge his initial burden, it shifts to the complainant. The complainant has failed to establish on record that the impugned cheque was issued by accused to discharge any legally enforceable liability of M/s Apex Printers and Stationers on whose account the impugned cheque is drawn. The complainant has also failed to produce any bill/invoice raised either against M/s Apex Printers or M/s Apex Arts which could establish the liquidated liability of the accused. Thus, the case of the complainant suffers from the basic infirmities which form the very basis of an offence under Section 138 of the Act. Consequently, ingredient no. 1 and 2 stand decided against the complainant and in favour of accused.*

4. It is urged by the learned counsel for the Petitioner that under Section 118 of the Act, there is a presumption that the cheques in question were issued by the Respondents for consideration. Even if the authorised representative of the Petitioner admitted in his cross-examination that there was no business dealing with M/s.Apex Printers and Stationers, Respondent No.1 was the proprietor of M/s.Apex Printers and Stationers as well as of M/s. Apex Art and thus the Respondents could not shy away from their liability to honour the cheques in question. The learned counsel for the Petitioner argues that the learned MM erred in acquitting the Respondents for the offence punishable under Section 138 of the Act.
5. As per the explanation appended to Section 138 of the Act debt or other liability has to be construed as legally enforceable debt or other liability. It is true that if a person 'X' is the proprietor of two firms 'A' and 'B' or even if one of the firms is a partnership firm, then the cheque issued by

‘X’ has to be treated as in discharge of legally enforceable debt or other liability of firm ‘A’ and ‘B’ provided such a case is set up in the notice and in the complaint. In such cases the liability is being taken by the Proprietor or the Partner in such capacity. Even a third person can issue a cheque if he agrees to discharge the liability of the person who is in debt. But, then, such a case has to be set up. A perusal of the complaint, a copy of which has been presented by the learned counsel for the Respondents during the course of arguments, reveals that the Petitioner simply stated that a cheque for a particular amount drawn on Canara Bank, Bhogal, New Delhi in favour of the complainant, that is, the Petitioner towards the amount due from them (Respondents) was dishonoured on presentation. Paras 2 and 3 of the complaint in respect of cheque No.508821 dated 19.04.2008 for ₹18,276/- are extracted hereunder:

“2. That the accused had issued a cheque no.508821 dated 19.4.2008 for ₹18,276/-(Eighteen thousand two hundred seventy six rupees only) drawn on Canara Bank, Bhogal, New Delhi in favour of the complainant, Vikel Business Corporation towards the amount due from them.

3. That the complainant presented the said cheque with Allahabad Bank, Nehru Place Branch for encashment. The said cheque was returned dishonoured by the Allahabad Bank with return memo given by Canara Bank, Bhogal, New Delhi to the complainant on 21.4.2008 with the reason “Funds Insufficient”.

6. The Petitioner was completely silent that the cheque was towards the liability of M/s. Apex Art and that Bishan Das was the proprietor or partner of the said M/s. Apex Art. Bishan Das was prosecuted in the above mentioned four complaint cases as proprietor of M/s.Apex Printers

and Stationers. Thus, it cannot be said that the cheques were issued by the Respondents towards legally enforceable debt or other liability.

7. It is urged by the learned counsel for the Petitioner that the Respondent No.1 has not entered the witness box to deny his liability. It is the cardinal principle of criminal jurisprudence that to prove his defence, an accused need not produce any defence evidence. He can very much prove his defence by taking aid of the evidence produced by the prosecution including the material elicited in cross-examination of the witnesses. That has exactly been done in the instant case as the Petitioner has admitted that the cheque was issued not towards liability of M/s.Apex Printers and Stationers, that is, Respondent No.2 but towards liability of M/s. Apex Art. These facts having not been pleaded by the Petitioner even in the complaint and as it is admitted that there was no liability of M/s.Apex Printers and Stationers and Respondent No.1 was also prosecuted as the proprietor of M/s.Apex Printers and Stationers, the conclusion reached by the learned MM that the Respondents have rebutted the presumption that the cheque was issued towards any legally debt or other liability cannot be faulted.
8. The principles which govern and regulate the hearing of Appeal by the High Court, against an order of acquittal passed by the Trial Court are well settled by a catena of judgments of the Apex Court.
9. While considering a Petition for Leave to Appeal by the prosecution or the complainant against an order of acquittal, the Court must be convinced that there is grave miscarriage of justice on account of erroneous view of the law or that the finding reached by the Trial Court is perverse. Mere errors in the Trial Court's reasoning are insufficient to

interfere in an order of acquittal. There has to be substantial and compelling reasons to interfere with an order of acquittal. As to what constitute such reasons, has been spelt out in *Chandrappa & Others v. State of Karnataka* (2007) 4 SCC 415 as follows:

"In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal :

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when :

- (i) The trial court's conclusion with regard to the facts is palpably wrong;*
- (ii) The trial court's decision was based on an erroneous view of law;*
- (iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*
- (iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*
- (v) The trial court's judgment was manifestly unjust and unreasonable;*
- (vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.*
- (vii) This list is intended to be illustrative, not exhaustive.*

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused. Had the well settled principles been followed by the High Court, the accused would

have been set free long ago. Though the appellate court's power is wide and extensive, it must be used with great care and caution.”

10. In the instant case, the learned MM has given good reasons to come to the conclusion that the Respondent had rebutted the presumption under Section 118 of the Act and that the Petitioner had failed to establish that the cheques were issued by the Respondent towards legally recoverable debt or other liability.
11. The Petitions seeking Leave to Appeal, therefore, are without any merit; the same are accordingly dismissed.

G.P. MITTAL, J.

MARCH 12, 2013

vk/pst