

* IN THE HIGHCOURT OF DELHI AT NEW DELHI
+ CRL.REV.P. 749/2010

Judgment delivered on: 11.07.2013

JAIPRAKASH SINGH

..... Petitioner

Through: Mr. Himanshu Munshi, Adv.

Versus

RASHMI AGRAWAL

..... Respondent

Through: Mr. Alok Bansal, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J.

1. This criminal revision petition has been preferred by the petitioner/accused to challenge the order dated 23.10. 2010 passed by the learned Additional Sessions Judge-I (Outer) Rohini Courts, Delhi whereby the learned Appellate Court allowed the appeal filed by the respondent/complainant.

2. Brief facts relevant for deciding the present revision petition are that the complainant, Mr. Dinesh Aggarwal was engaged in the business of stainless steel and gift items under the name and style of M/s Family Gift Emporium and advanced a loan of Rs. 1,25,000/- in March 2002 to the petitioner/accused. Towards the discharge of the said loan liability, the petitioner/accused issued two post-dated cheques bearing nos. 849381 dated

15.05.2003 amounting to Rs. 70000/- and 414683 dated 22.06.2003 amounting to Rs. 75000/- both drawn on Bank of Baroda, New Delhi-110085. The said cheque amounts included Rs. 20,000/- as interest on the loan amount. It has been the case of the complainant that when the said cheques were presented for encashment, the same were returned back unpaid/dishonoured on the ground of “account closed” and thereafter in pursuance of the same, a legal demand notice dated 02.07.2003 was issued to the petitioner/accused but despite the service of the notice, the petitioner/accused failed to clear the said liability and this led the complainant/respondent to file a complaint u/s 138 of Negotiable Instruments Act, 1881 against the present petitioner/accused. The petitioner/accused after summoning was put to trial. Notice under section 251 Cr.P.C was given to the petitioner/accused for the offence under Section 138 of the Negotiable Instruments Act, 1881 vide order dated 8.7.2004 to which the petitioner/accused pleaded not guilty and claimed trial. The Trial Court vide judgment dated 9.3.2010 dismissed the complaint primarily on the ground that there was material alteration in the cheques in question and that the cheques were not issued in discharge of legally enforceable liability. The original complainant Mr.Dinesh Aggarwal expired during the trial and vide order dated 16.11.2009, the appellant was substituted as the

complainant. Aggrieved by the order dated 9.03.2010 the appellant had preferred an appeal inter-alia on the grounds that the impugned judgment was bad in law, the testimony of original complainant and statement of J.N Singh were misconstrued by the learned trial court; there was no material alteration in the cheques in question etc. The said order passed by the learned trial court was set aside by the Learned Additional Sessions Judge vide order dated 23.10.2010 and the Learned Additional Sessions Judge convicted the petitioner/accused u/s 138 of the Negotiable Instruments Act, 1881 and the petitioner/accused was sentenced to rigorous imprisonment for nine months with a fine of Rs. 2,00,000/- and in default of fine SI for three months vide order dated 29.10.2010.

3. Assailing the order of the learned Additional Sessions Judge, counsel for the petitioner, Mr. Himanshu Munshi submitted that the learned Additional Sessions Judge failed to appreciate that the two cheques in question bearing Nos. 414683 dated 22.6.2003 and 849381 dated 15.5.2003 were from different cheque books of 10 leaves each and cheques were encashed sometime in the year 2000 from the said cheque books and therefore, both the cheques in question could not have been issued by the petitioner/accused in the year 2003 as per the case set up by the complainant. Counsel further argued that the five blank cheques and

property papers were given by the petitioner to the complainant as security but two cheques out of the said five blank cheques were misused by the complainant after filling in the blanks some times in the year 2003 and thereafter these two cheques were presented in the bank by the complainant without the consent of the petitioner/accused. Counsel also argued that once the petitioner/accused discharged his burden to prove the fact that the said two dishonored cheques were not issued towards any legally enforceable debt, onus thereafter shifted on the complainant to have proved it otherwise. Counsel also argued that the complainant did not produce any account book or lending agreement to show that the amount of Rs. 1,25,000/- was advanced by him to the petitioner/accused. Counsel also contended that no agreement to pay interest on the loan amount was proved by the complainant. Counsel also submitted that the complainant was also not having any license for lending money and therefore he could not have advanced loan amount to the petitioner/accused legally also. Counsel also argued that the learned Appellate Court also did not appreciate the fact that the said five blank cheques were issued by the petitioner/accused towards security and as per the settled legal position a security amount cannot be recovered under Section 138 of the Negotiable Instruments Act. In support

of his arguments counsel for the petitioner/accused placed reliance on the following judgments:-

1. ***Kumar Exports v. Sharma Carpets, AIR 2009 SC 1518***
2. ***BPDL Investments (Pvt.) Ltd. v. Maple Leaf Trading International (Pvt.) Ltd., 129 (2006) DLT 94***
3. ***Kamala S. v. Vidyadharan M.J. and Anr., (2007)(3) CALE 235***
4. ***M.S. Narayana Menon@Mani v. State of Kerala and Anr., AIR 2006 SC 3366***
5. ***Krishna Janardhan Bhat v. Dattatraya G. Hedge, AIR 2008SC 1325***

4. Counsel appearing for the respondent/complainant on the other hand supported the judgment passed by the Learned Additional Sessions Judge. Counsel submitted that the learned Appellate Court has appreciated the legal position correctly and there is no infirmity, illegality or perversity in the order passed by the said Court.

5. I have heard the learned counsel for the parties and also given my anxious consideration to the arguments advanced by them.

6. In order to determine whether the offence punishable under Section 138 Negotiable Instruments Act, 1881 is made out against the petitioner/accused in the instant case, it would be necessary to first delve upon Sections 118 and 139 of the Negotiable Instruments Act, 1881 which deal with the subject of '*presumptions*' that are to be raised in deciding the liability of the accused under Section 138 Negotiable Instruments Act.

Section 118 of the Act deals with the presumption with respect to consideration to be raised until the contrary is proved. Relevant portion of Section 118 is read as under:-

Section 118 - Presumptions as to negotiable instruments- Until the contrary is proved, the following presumptions shall be made:-
(a) of consideration--that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

Section 139 of the Act provides for presumption in favour of the holder and reads as under

Section 139. Presumption in favour of holder

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, of any debt or other liability.

7. While discussing the scope and ambit of the above two provisions, the Apex Court in *Kumar Exports v. Sharma Carpets, AIR 2009 SC 1518* observed in Para 11 as under:

11. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies

the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions

arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.

8. The aforesaid legal position has been reiterated by the Apex Court in a recent case of *Vijay v. Laxman and Anr .(2013) 3 SCC 86*, wherein the Hon'ble Division Bench observed as following while appreciating various judgments on this issue-

19. ...We are not unmindful of the fact that there is a presumption that the issue of a cheque is for consideration. Sections 118 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption is, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. It is trite that the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently rebutted. The legal position regarding the standard of proof required for rebutting a presumption is fairly well settled by a long line of decisions of this Court.

20. In *M.S. Narayana Menon v. State of Kerala* : (2006) 6 SCC 39, while dealing with that aspect in a case Under Section 138 of the Negotiable Instruments Act, 1881, this Court held that the presumptions Under Sections 118(a) and 139 of the Act are rebuttable and the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubt. The Court observed:

29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause)...

30. Applying the said definitions of "proved" or "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, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man 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.

xxxxxxx

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

xxxxxxx

41. ... 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'.

21. The decision in M.S. Narayana Menon (supra) was relied upon in K. Prakashan v. P.K. Surenderan : (2008) 1 SCC 258 where this Court reiterated the legal position as under:

13. 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.

14. 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.

22. To the same effect is the decision of this Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde : (2008) 4 SCC 54 where this Court observed:

32. Standard of proof on the part of an accused and that of the prosecution a criminal case is different.

xxxxxxx

34. 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.

xxxxxxx

45. ... 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.

23. Presumptions Under Sections 118(a) and Section 139 were held to be rebuttable on a preponderance of probabilities in Bharat Barrel and Drum Manufacturing Co. v. Amin Chand Pyarelal : (1999) 3 SCC 35 also where the Court observed:

11. Though the evidential burden is initially placed on the Defendant by virtue of Section 118 it can be rebutted by

the Defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the Defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the Plaintiff who has also the legal burden.

24. In Hiten P. Dalal v. Bratindranath Banerjee : (2001) 6 SCC 16 this Court compared evidentiary presumptions in favour of the prosecution with the presumption of innocence in the following terms:

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 exists, 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. ...

25. Decisions in Mahtab Singh and Anr. v. State of Uttar Pradesh : (2009) 13 SCC 670, Subramaniam v. State of Tamil Nadu : (2009) 14 SCC 415 and Vishnu Dutt Sharma v. Daya Sapra : (2009) 13 SCC 729, take the same line of reasoning.

9. In the light of the aforesaid legal position, let us see whether the petitioner/accused in the present case has succeeded to rebut the

presumption arising in favour of the respondent/complainant in terms of Section 118 read with Section 139 of the Negotiable Instruments Act. The main defence raised by the petitioner is that the loan amount of Rs.1,00,000 was taken by him in the year 2000 and he had issued five signed blank cheques towards security to the respondent/complainant. He has also raised a defence that he had also handed over the original documents of property bearing No.C1/117 Sector 16, Rohini as additional security for the repayment of the loan amount. He has also raised a defence that he had returned an amount of Rs. 1,75,000/- to the complainant towards full and final satisfaction of the said loan amount. He has further explained that an amount of Rs.25,000 was paid by him to the respondent/complainant in cash through one Mr.Shukla, Rs. 50,000/- was paid by him vide cheque bearing No. 633401 dated 23.9.2001 and a sum of Rs. 1 lakh vide cheque bearing No.256389 dated 8.11.2002. It is also the defence of the petitioner that he could not have issued the two cheques in question in 2003 as his bank account came to be closed on 4.3.2002. From the defence raised by the petitioner it becomes quite manifest that the petitioner has not disputed the advancement of the loan amount of Rs. 1,00,000/- by respondent/complainant. Once having admitted the advancement of the loan amount, the same was not required to be separately proved through any

other documentary evidence. The petitioner has further admitted the fact that he had issued five blank cheques, which were duly signed by him. This fact again establishes the fact that two of the cheques, which were dishonoured, also stand admitted by the petitioner and the question whether in all five cheques were issued by the petitioner becomes irrelevant more so when the petitioner failed to prove this fact by leading any cogent evidence. The petitioner also failed to produce Mr. Shukla through whom the said amount of Rs. 25,000/- was alleged to have been paid in cash to the complainant. The petitioner further failed to produce his wife to prove the alleged payment of Rs. 50,000/- from her bank account in favour of the complainant. The petitioner also did not adduce any evidence to show that an amount of Rs. 1 lakh was paid by him vide cheque No. 256389 to the complainant. In my view, the learned Appellate Court was right in observing that a mere denial of the averments made by the complainant is not sufficient for rebutting the presumptions arising in favour of the complainant under Sections 118 and 139 of the Act. It is for the accused to demonstrate that there exist preponderance of probabilities that the cheques in question were not issued towards discharge of any legally enforceable debt/liability. The learned Appellate Court also found that the defence raised by the petitioner with regard to deposit of the original documents of the

property bearing No. C1/117 Sector 16, Rohini as security does not inspire any confidence as during his cross-examination he admitted the fact that the suit property belongs to his father-in-law and he was not having any authority to deposit the original documents of the said property with the complainant. The learned Appellate Court also placed reliance on the judgment of the Apex Court in ***K. Bhaskaran Sankaran Vaidhyam Balan and Another*** reported in (1999) 7 SCC 510 while holding that once the accused has admitted his signatures on the cheques then the presumption that the said cheques were drawn for consideration on the date the cheque bears can be legally inferred. The learned Appellate Court further placed reliance on the case of ***Satish Jayantilal Shah v. Pankaj Mashruwala and Anr.*** reported in 1996 Crl.L.J. 3099 wherein it was held that the entire body of the cheque need not be written by the maker or the drawer as the signatures of the drawer on a cheque is a material fact.

10. Undeniably, as per the settled legal position, to rebut the statutory presumptions arising in favour of the complainant under Section 118 read with Section 139 of the Negotiable Instruments Act, the accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial, yet the accused has to raise a probable defence and prove on record such facts and circumstances that are sufficient

to rebut the presumptions having arisen in favour of the complainant in terms of Section 118 read with Section 139 of the Negotiable Instruments Act. The accused cannot succeed in rebutting the statutory presumptions as envisaged under Section 118 read with Section 139 of the Negotiable Instruments Act by mere denials or by raising a weak defence or even by raising a strong defence but not proving the same through any reliable or cogent evidence.

11. As already discussed above, it is not the case of the petitioner that no loan amount was advanced to him or that he had never issued the cheques in question to the complainant. The argument advanced by the petitioner that the bank account of the petitioner was closed in the year 2002 would also not help the case of the petitioner; rather, this very fact raises a noteworthy question as to why the bank was not informed about the issuance of the alleged five blank cheques by the petitioner at the time of closure of the bank account. The petitioner has also failed to prove on record any fact to show that he had ever raised any demand for the return of the alleged five cheques or for the return of the original documents of the property bearing No. C1/117 Sector 16, Rohini after the alleged payment of Rs. 1,75,000/- being made by him to the complainant. In the light of the said facts, the case

of the petitioner does not fall even in the category of throwing enough suspicion on the claim of the complainant.

12. This Court, thus, does not find any reason to upset the view taken by the first Appellate Court. The present revision petition is hereby dismissed. The petitioner is on bail therefore, his bail bonds are cancelled. The petitioner is directed to forthwith surrender to the custody of the trial court to serve out the remaining period of sentence.

13. With the above directions, the revision petition stands disposed of.

KAILASH GAMBHIR J.

JULY 11, 2013

v