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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 29th April, 2015

+ CRL.A. 1238/2011

VIJAY KUMAR GUPTA Appellant
Through: Mr. F.K. Jha, Advocate

versus

BIJENDER KUMAR PANWAR Respondent
Through: Mr. Rajiv Singh, Advocate

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Feeling aggrieved by the acquittal order passed in favour of the respondent in CC No. 480/1 filed by the appellant before the learned Metropolitan Magistrate, present appeal has been preferred under Section 378(4) r/w Section 482 Cr.P.C.
2. Complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') was filed by the appellant against the respondent, *inter alia*, on the allegations that the respondent took a loan of Rs.3,45,000/- with interest @ 18% per

annum from the appellant on 15th January, 2006 for his daughter's marriage with the promise that he would return the loan amount within two years. At that time the respondent issued various post dated cheques. Cheque No. 525360 amounting to Rs.12000/- dated 26th April, 2008 drawn on Central Bank of India towards partial discharge of his liability was dishonoured upon presentation with the remarks "funds insufficient". A legal notice was served upon the respondent calling upon him to make the payments. However, on failure to pay the amount, the complaint was filed. By the impugned judgment dated 23rd August, 2011, learned ACJ-cum- ARC, North West Rohini referred to the provision of Section 138 and 139 of the Act and observed that these Sections lay down the consequences of dishonour of cheque and further lay down certain principles on the basis of which the liability of the drawer are to be ascertained. These essential principles were enumerated as:-

- (i) The cheque was issued by the drawer.
- (ii) The Cheque was issued for a valid consideration.
- (iii) The cheque was presented and was dishonoured
- (iv) Legal notice was sent within time period as prescribed.
- (v) No payment was made after receipt of the notice.

3. It was observed that it was undisputed case of the parties that cheque in question was issued by the accused and the same was dishonoured, a legal notice was sent by the complainant for which reply was sent and no payment was made even after receipt of the notice. As such, it was observed that out of five essential ingredients four were not disputed by the accused and the only point in dispute was whether the cheque was issued for a valid consideration. Here again, the complainant has stated that the accused had taken a friendly loan and he was not having any business dealing with the accused and, therefore, by leading his evidence, he had shifted the burden upon the accused which was not discharged by the accused properly by leading his evidence by saying that the cheque in question was given towards security but the learned Trial Court relied upon the certified copy of the judgment passed in another complaint filed by the complainant against the respondent where the respondent was acquitted by observing that the accused was able to show that he was having business dealing with the complainant and the cheque in question was issued as security towards payment which was to be collected by the accused in due course of business. The cheque in question forms part of the same series which was issued for the

purpose of security. Learned Trial Court also relied upon the certified copy of the statement of three witnesses examined by the respondent in that case for observing that the accused was able to show by “*preponderance of possibilities*” that he was having business dealing with the complainant and the cheque was given towards security against the payment which was collected by him on his behalf and the cheques were to be returned by the complainant as and when the payment was received by him and, therefore, the respondent was acquitted of the charge.

4. It was submitted by the learned counsel for the appellant that the Trial Court fell in grave error by relying upon the certified copies of the evidence and the judgment led in another case. The order suffers from material irregularities and, as such, the impugned order is liable to be set aside. He further submitted that out of eleven cases filed by the appellant/complainant, respondent has been convicted in nine cases.

5. Counsel for the respondent, on the other hand, submitted reply/objections to the appeal stating therein that the appellant’s son namely, Sh. Vivek Kumar Gupta, Proprietor of M/s. Garg Enterprises represented himself as ‘Super Stockist’ of Amulya Biscuit, supplier

of Raj Agro Food Product and the respondent was doing the work of marketing in the name and style of M/s. JMD Marketing Company. He contacted the appellant for the marketing of products of Amulya Biscuit and to supply the same in the market. The respondent supplied the goods after taking the same from the appellant's son and for the said purpose, the respondent had to provide advance securities cheque which was signed by the respondent and rest of the part of cheque was filled up by the appellant, hence, the appellant in conspiracy with his son, misused the cheques illegally. He further submitted that appeals have been preferred challenging the conviction.

6. Before advertng to the respective contentions of the learned counsels appearing on either side, it is beneficial to quote Section 118(a) , Section 138 and Section 139 of the Act. These Sections read as under:-

"S. 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."

"S.138 Dishonour of cheque for insufficiency, etc., of funds in the account.-Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

"S.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. Section 138 of the Act was incorporated with a specific object of enacting a special provision to impose a strict liability so far as the negotiable instruments are concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, the trade and commerce activities in the present day world are likely to be adversely affected as it is impracticable for the trading community to carry on with the bulk of the currency in force.

8. In ***Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd.***, (2001) 6 SCC 463, the offence is explained in the following words:

"4. Section 138 of the Act makes a civil transaction to be an offence by fiction of law. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person is returned by the bank unpaid either because of the

amount or money standing to the credit of that person being insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person, subject to the other conditions, shall be deemed to have committed an offence under the section and be punished for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both. To make the dishonour of the cheque as an offence, the aggrieved party is required to present the cheque to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier and the payee or the holder in due course of the cheque makes a demand for payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and drawer of such cheque fails to make the payment of the amount within 15 days of the receipt of the said notice. Section 139 refers to presumption that unless the contrary is proved, the holder received the cheque of the nature referred to under Section 238 for the discharge in whole or in part or of any debt or other liability. Section 140 restricts the defence in any prosecution under Section 138 of the Act and Section 141 refers to such offence committed by the companies. Section 142 provides that, notwithstanding anything contained in the Code of Criminal Procedure, no court shall take cognizance of an offence under the section except upon a complaint in writing made by the payee or, as the case may be, the holder of the cheque and that such complaint is made within one month of the date on which the cause of action arose under Clause (c) of proviso to Section 138 of the Act.

9. In ***Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.***, (2000) 2 SCC 745, the Hon'ble Apex Court explained the ingredients of the offence under Section 138 N.I. Act as under:-

"10. On a reading of the provisions of Section 138 of the NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

7. In **Hiten P. Dalal v. Bratindranath Banerjee**, AIR 2001 SC 3897, the Supreme Court observed that Sections 138 and 139 of the Act introduced exceptions to the general rule as to the burden of proof in criminal cases and shifted the onus on the accused in the following manner:

*"Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in **State of Madras v. A. Vaidyanatha Iyer**, AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. 'it introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused' (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court 'may presume' a certain state of affairs. 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.

*In **K.N. Beena v. Muniyappan**, 2001(2) ALD (Crl.) 824 the Supreme Court observed that it would be erroneous approach in case the burden is cast on the prosecution/complainant to prove that the cheque was issued for a debt or liability. The Supreme Court further observed that the accused had to prove in the trial by leading cogent evidence that there was no debt or liability and that the accused not having led any evidence could not be said to have discharged the burden cast on him.*

*In **Rangappa v. Mohan**, AIR 2010 SC 1898 also the Supreme Court held that existence of legally recoverable debt or liability is a matter of presumption under Section 139 of the Act.*

8. Reverting to the case in hand, it was rightly observed by the learned Trial Court that there was no dispute regarding issuance of cheque by the respondent, its dishonour on presentation on account of “insufficient funds”, service of legal notice upon the respondent and its reply by the respondent. The only question left for consideration was whether the cheque was issued for a valid consideration or not, inasmuch as, it is the case of the complainant that son of the complainant was well known to the respondent. The respondent approached the complainant and demanded a friendly loan of Rs.3,45,000/- for the marriage of his daughter, which was given and in lieu thereof post dated cheques were issued by the respondent. However, case of the respondent was otherwise having initially

proved that the cheque was given for a valid consideration. Once the complainant had proved that the cheque was issued by the respondent for a valid consideration and issuance of which was not denied by the respondent, the presumption under Section 118(a) would arise that the same was issued for a valid consideration. However, the presumption is rebuttable. The respondent could have proved non-existence of consideration by raising a probable defence. If the respondent discharge the initial onus of proof showing that the existence of consideration was improbable or doubtful, the onus would shift upon the appellant. So far as the case in hand is concerned, the Trial Court observed that the complainant had stated that the accused had taken friendly loan and he was not having any business dealing with the accused and thereafter, the burden shifted upon the accused which was not discharged by him by leading any evidence, however, the Trial Court primarily relied upon the certified copy of the judgment and the evidence led by the respondent in another complaint case. This approach of the learned Trial Court has resulted in miscarriage of justice, inasmuch as, each and every case has to be considered on the peculiar factual matrix appearing in that case. Although the certified

copy of the judgment is admissible in evidence but the court could not have taken recourse to the evidence led by the respondent in that case.

9. Further a perusal of record goes to show that the respondent has been taking different pleas at different places:-

(i) After the cheque in question was dishonoured and legal notice was served upon the respondent, he sent a reply dated 12th May, 2008 Ex.CW1/6 where it was alleged that the appellant's son, namely, Vivek Gupta had friendly relation with the respondent due to which respondent approached the appellant for some money. The appellant assured the respondent that he would provide money to him but as surety he demanded post dated cheques and under false assurance of the appellant and his son, post dated cheques were given, details of which were mentioned in previous reply of notice. In this reply, there is no averment that the respondent had any business dealing either with the appellant or his son. It is simply alleged that due to friendly relation with the son of the appellant, the respondent approached the appellant for some money and the appellant assured to provide him money against issuance of post dated cheques.

- (ii) After the filing of the complaint, when notice under Section 251 Cr.P.C. was served upon him, he admitted issuance of cheque in question, however, denied receipt of any legal notice dated 5th May, 2008 Ex.CW1/3, whereas in his statement u/s 313 Cr.P.C., he admitted the receipt of this notice and sending of the reply.
- (iii) The complainant/appellant examined himself and in cross-examination, he reiterated that the accused was known to his son and used to come to his house. He requested him to give loan amount since he needed money for the marriage of his daughter. Believing his version, complainant advanced loan to him. There is no challenge to this part of his testimony that the loan amount was not given by the complainant for the marriage of his daughter. On the other hand, it was suggested to the witness that the cheque amount has been paid by the accused despite that the complainant had retained the cheque issued by the accused. However, no suggestion was given to the complainant that the cheque was issued as security towards any business transaction either with the complainant or his son.

- (iv) In his statement recorded under Section 313 Cr.P.C., it was alleged that the respondent and the complainant were having business terms and the cheque was issued as security which was to be returned when the payment was received from the market. However, since no payment was received from the market, therefore, the relations became strained. It was further alleged that a sum of Rs.30,765/- was paid and despite receiving the payment, the cheque has not been returned back by the complainant.
- (v) In reply/objections filed to the present appeal, a different plea has been taken by alleging that son of the appellant, namely, Sh. Vivek Kumar Gupta, proprietor of M/s. Garg Enterprises represented himself as Super Stockist of Amulya Biscuits. Therefore, the respondent contacted the appellant for the marketing of products of Amulya Biscuits and after taking the goods from the son of the appellant, he supplied the goods in the market. Advance security cheques signed by the respondent were given. Rest of the part of the cheque was filled up by the appellant and the same were misused illegally.

10. Learned Trial Court basically relied upon three witnesses examined by the respondent in the other complaint filed by the complainant against the respondent. DW1 Sh. Naresh Chander who deposed in that case that the appellant was having a concern in the name of Garg Enterprises which was dealing in the business of biscuit manufacturing. He was working under the respondent on salary basis. His job was to go to market and collect money on behalf of Bijender Kumar and as per the direction that money was to be deposited with the appellant, he used to deposit the money with the appellant but he never returned any cheque on the pretext that he would give the same to the respondent. After 2-3 years, the business was stopped. DW2 Chunni Lal deposed that he was working as a sales man in Garg Enterprises and his job was to bring the goods, to collect the payment and deposit the same with the complainant. The accused used to ask him to deposit cash with the complainant and bring the cheque, however, the cheque was never returned by the complainant. DW3-Mehraj Khan was distributor of the biscuits. According to him, the biscuit was supplied through Raj Agro Products, namely, Amulya Biscuits. He was not having any final bills and only kachcha bills were issued by Garg Enterprises. By examining these witnesses, the

respondent probably wanted to take a plea that he was working on commission basis for the complainant and he had deposited some security cheques with the complainant which were to be returned on payment of money. However, the same was never returned. The complainant has deposed that he was a government employee and was not running any business. These witnesses have deposed that it was the complainant who was running the business. However, in the reply/objections filed by the respondent, it was alleged that it was the son of the appellant who was doing the business. Under the circumstances, respondent himself is not clear about his defence and in fact, this defence was never taken by the respondent in the complaint case which is the subject matter of the present appeal. Therefore, the defence which was taken by the respondent in another complaint could not have been considered by the learned Trial Court while considering the present complaint. So far as the present complaint is concerned, the reply to the legal notice makes a mention that the respondent was in need of money and since he was having friendly relations with the son of the appellant, therefore, he approached him for some money to which the appellant agreed. However, post dated cheques were taken in lieu thereof. Issuance of

post dated cheques is not even disputed by the respondent. The only bone of contention is on which account these post dated cheques were issued. The testimony of the complainant regarding giving a sum of Rs.3,45,000/- for the marriage of daughter of the respondent again goes unchallenged and unrebutted as it was not assailed in cross-examination except for taking a vague plea in his statement recorded under Section 313 Cr.P.C. that he was having some business term with the complainant, no such things were elicited in the cross-examination of the complainant. Moreover, it was pleaded that the cheque amount stands paid, despite that the cheque was not returned by the complainant. However, even this part of the defence is not proved. At no point of time, any complaint was made by respondent for non-returning or misuse of the cheque despite payment. No direction was issued by him to his banker to stop payment for misuser of the cheques.

11. Under the circumstances, the respondent had failed to rebut the presumption which was in favour of the complainant and, therefore, the complainant had succeeded in establishing his case. Despite noticing that all the essential ingredients of Section 138 r/w Section 139 of the Act were proved by the complainant, by relying upon the

judgment in another complaint, the learned Trial Court fell in error in acquitting the respondent.

12. As such, the impugned judgment cannot be sustained and the same is set aside. The appeal is accordingly allowed.

13. The respondent is directed to pay double the cheque amount to the complainant within 60 days against proper receipt failing which the learned Trial Court is directed to get the amount recovered in accordance with law.

Trial Court record along with copy of the judgment be sent back.

**(SUNITA GUPTA)
JUDGE**

APRIL 29, 2015

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