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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 13th January, 2015

+ **CRL.A.1400/2011 & Crl.M.A. 4777/2014**

G L SHARMA

..... Appellant

Through: Mr. K.K. Manan, Mr. Nipun Bhardwaj
and Mr. Ravinder, Advocates along with
Appellant in person

Versus

HEMANT KISHOR

..... Respondent

Through: Mr. Vikash Chandra and Mr. S.L. Gupta,
Advocates

+ **CRL.A. 1401/2011 & CRL. M.A. 4776/2014**

G L SHARMA

..... Appellant

Through : Mr. K.K. Manan, Mr. Nipun Bhardwaj
and Mr. Ravinder, Advocates along with
Appellant in person.

versus

SHOBHA SAXENA

..... Respondent

Through : Mr. Vikash Chandra and Mr. S.L. Gupta,
Advocates

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Vide this common judgment, I shall dispose of two appeals bearing Crl.A.No.1400/2011 and 1401/2011 as both the appeals have been filed by an unsuccessful complainant in case relating to offence

punishable under Section 138 of Negotiable Instruments Act, 1881 (in short “NI Act”) against the respondents who are mother and son, *inter alia*, on the allegation that CC No.1953/1/2009 was filed before Additional Chief Metropolitan Magistrate against the accused Hemant Kishore on the ground that the accused, for repayment of his debt liability, issued one cheque bearing No.717470 dated 22nd August, 2008 for Rs.3 lacs drawn on Indian Bank, New Delhi but on presentation, the cheque was returned unpaid with remarks “fund insufficient”. Thereafter, a legal notice dated 16th March, 2009 was issued by the complainant demanding the money but on failure of the accused to pay the amount, the complaint was filed. CC No. 1954/1/2009 was filed against the accused Shobha Saxena on the allegations that cheque bearing No.538942 dated 7.1.2009 amounting to Rs.3,00,000/- drawn on Indian Overseas Bank, New Delhi was issued towards discharge of debt liability which on presentation was dishonoured on 24.4.2009 with remarks ‘funds insufficient’. Legal demand notice dated 6.5.2009 was issued by the complainant demanding the amount. On failure to pay the amount, the complaint was filed. After being satisfied that prima facie case against the accused u/s 138 NI Act was made out, cognizance was taken and

accused were summoned. Notice under Section 251 Cr.P.C. was framed against them to which they pleaded not guilty and claimed trial.

2. The complainant examined himself as CW1 by adopting his affidavit Ex.CW1/A and exhibited the following documents:-

- (i) Cheque bearing No.717470 dated 22.08.2008 amounting to Rs.3,00,000/- (Rupees Three Lacs only) drawn on Indian Bank, New Delhi as **Ex.CW1/1** in CC No.1953/1/2009 and cheque bearing No. 538942 dated 7.1.2009 amounting to Rs. 3,00,000/- drawn on Indian Overseas Bank as **Ex.CW1/1** in CC No.1954/1/09.
- (ii) Returning memo dated 21.02.2009 with remarks “refer to drawer” as **Ex.CW1/2** in CC No. 1953/1/2009 and returning memo dated 24.4.09 with remarks ‘funds insufficient’ as **Ex. CW1/2** in CC No.1954/1/2009.
- (iii) Legal demand notice dated 16.03.2009 as **Ex.CW1/3**. Postal dispatch receipt as **Ex.CW1/4** and AD card as **Ex.CW1/5** in CC No.1953/1/2009 and legal demand notice dated 6.5.2009 as **Ex.CW1/3**, postal dispatch receipt as **Ex.CW1/4**, UPC dispatch receipt as **Ex.CW1/5** and AD Card as **Ex.CW1/6** in CC No.1954/1/2009.

3. All the incriminating evidence was put to the accused while recording their statements under Section 313 Cr.P.C. wherein

substantially similar plea was taken. Signatures on the cheque were not denied, however, it was alleged that the cheque was not issued towards any debt or liability. It was a blank signed cheque and was given to Chit Fund Committee as a security. They further denied having taken any loan from the complainant or that any legal notice was received by them. One witness, namely, Rajesh Kumar-DW1 was examined in defence evidence. After referring to the provisions of Section 138, 118 Clause (a), 146 and 139 of NI Act, learned Trial Court observed that a combined reading of these Sections raises a presumption in favour of the holder of the cheque that he has received the same for discharge in whole or in part of any debt or other liability. However, the presumption available under Section 139 NI Act can be rebutted by the accused by raising the probable defence and the burden is on the accused. Having said so, the learned Trial Court dismissed the complaint by relying upon *M/s. Pine Product Industries & Anr. vs. M/s. R.P. Gupta & Sons & Anr.*, 2007 (99) DRJ 352, primarily on the ground that the averments made in the complaint are vague in nature and bereft of necessary details and, therefore, acquitted the accused.

4. Assailing the findings of the learned Trial Court, it was submitted by learned counsel for the appellant that the learned Trial Court fell in error in not appreciating Section 139 of the Act in a proper perspective as this Section shifts the burden of proof on the accused in respect of cheque bouncing cases. Once the cheque relates to the account of the accused and they accept and admit their signatures on the cheque, then initial presumption as contemplated under Section 139 of the Act has to be raised in favour of the complainant. The presumption referred to in Section 139 of the Act is mandatory presumption although the accused is entitled to rebut the said presumption. The defence raised by the accused was that they had given a blank signed cheque to a Chit Fund Committee, however, in order to rebut the presumption, accused examined DW1 Rajesh from the Chit Fund Company. Although no opportunity to cross-examine this witness was given to the complainant, however, since this witness did not favour the accused, as such, the complainant did not stress on not affording any opportunity to cross-examine the witness. This witness denied that cheque Ex.CW1/1 was given by the accused to the Chit Fund. As such, accused failed to rebut the presumption. Moreover, in cross-examination, the complainant gave

complete details that the accused were known to him from before and loan was given on the request of accused Shobha Saxena that her sons wanted to start a factory. Under the circumstances, even if there was some vagueness in the complaint, same was clarified in cross-examination and the tenor of cross-examination clearly reflects that it was admitted by the accused that loan was taken by them from the accused in lieu of which the cheque was given. As such, it was submitted that the learned Trial Court fell in error in acquitting the accused, accordingly, the impugned order is liable to be set aside.

5. On the other hand, it was submitted by the learned counsel for the respondent that the legal notice itself is defective, inasmuch as, as per the bank endorsement, the cheque was “referred to drawer” whereas it was alleged by the complainant in the legal notice that it was dishonoured due to insufficient funds. Once the legal notice itself is defective, all the proceedings emanating therefrom goes. Furthermore, complainant was not known to the accused whereas DW1 Rajesh was relative of the complainant. The cheque was given by the accused to the Chit Fund and, therefore, DW1 being an employee of the Chit Fund might have given the cheque to the complainant. The pleadings are quite vague. The onus was on the

complainant to prove his case. The impugned order does not suffer from any infirmity which calls for interference. As such, the appeals are liable to be dismissed.

6. Before adverting 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 Negotiable Instruments 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.

11. Once the cheque relates to the account of the accused and he accepts and admits the signature on the said cheque then initial presumption as contemplated under Section 139 of the Act has to be raised by the Court in favour of the complainant. The presumption

referred to in Section 139 of the Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption. What is required to be established by the accused in order to rebut the presumption is different from each case under given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttable evidence. In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the Court. It would be relevant to refer to the observations of the Apex Court in the case of **Hiten P. Dalal v. Brantindranath Banerjee**, AIR 2001 SC 3897, where it was held that:-

"The Appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "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". The effect of these presumptions is to place the evidential burden on the Appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

*22. 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. Vaidvanatha Iyer**, 1958 Cri. LJ 232, 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 introduces 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.

23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court but the 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 exists", 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'.

24. Judicial statements have differed as to the quantum of rebutting evidence required. In **Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay**, AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in **Dhanvantrai Balwantrai Desai v. State of Maharashtra**, 1964 Cri. LJ 437, where this Court reiterated the principle enunciated in **State of Madras v. Vaidyanath Iyer** (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised

under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted..."

10. Coming to the factual matrix of the case in hand, the complaint under Section 138 of NI Act was filed by the appellant mainly on the allegations that the respondents had issued cheque in favour of the appellant and the said cheque on presentation by the appellant was returned by the drawing Bank with the reasons "insufficient funds". The appellant served a legal notice upon the respondents but despite receipt of the said legal notice, the respondents did not come forward to make payment of the dishonoured cheque within the stipulated period. As stated above, in order to substantiate his case, complainant tendered his affidavit and proved the cheque Ex.CW1/1, its dishonour by the drawing bank followed by a legal notice. After the accused were summoned, notice under Section 251 Cr.P.C. was served upon them. As observed in ***Rajesh Aggarwal and Ors. vs. Y.K. Goel***, 2010 VII AD (Delhi) 57 since offence under Section 138 of N.I. Act is a

document based technical offence, deemed to have been committed because of dishonour of cheque issued by the accused or his company or his firm, the accused must disclose to the Court as to what is his defence on the very first hearing when the accused appears before the Court. The accused, however, did not disclose their defence at that stage. Thereafter when all the incriminating evidence was put to the accused while recording their statement under Section 313 Cr.P.C. at that time, there was no denial that the cheque in question was signed by them. However, it was alleged that the cheque was not issued against any debt or liability and that the cheque was not issued to the complainant. Service of legal notice was also denied. It was alleged that no loan was taken from the complainant. Accused was a member of Chit Fund Company and the cheque in question was given to Chit Fund Company as a security. In order to substantiate this plea, DW1 Rajesh Kumar, employee of Sevarath Chit Fund Pvt. Ltd. was examined and this witness denied that any cheque or payment was received by the Chit Fund from the accused. Since the witness did not support the case of accused, he was cross-examined by the counsel for the accused and in cross-examination, the witness categorically deposed that the company did not take any cheque amounting to Rs.3

lacs from the accused. He also deposed that cheque Ex.CW1/1 was never taken from the accused.

11. Under the circumstances, the defence of issuing of the blank signed cheque to the Chit Fund taken by the accused falls to the ground. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. Reverse onus clauses usually impose an evidentiary burden. It is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail.

12. As discussed above, the accused has failed to raise a probable defence which may create doubts about the existence of a legally enforceable debt or liability. However, relying upon *Pine Product Industries and Anr. (supra)*, the complaint was dismissed by the

learned Trial Court primarily on the ground that the averments made in the complaint were vague. In that case, after the complainant sent a statutory notice, the accused sent a detailed reply showing that the cheque was misused by the complainant and no amount was due from the petitioner. After referring to the reply to the notice and the cross-examination, the conviction was set aside on the ground that the complaint was based on vague and bald allegations. However, things are entirely different in the instant case. Although it is true that no details were forthcoming in the complaint, however, as observed by Supreme Court in *K.N. Beena vs. Muniyappan & Anr.* , (2001) 8 SCC 458 and *M.M.T.C. Ltd. and Anr. vs. Medchl Chemicals & Pharma (P) Ltd. and Anr.*, (2002) 1 SCC 234 there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondent. This they have to discharge at the trial. None of the respondent stepped in the witness box so as to subject themselves to cross-examination. Although it is not incumbent upon the accused to examine himself/herself in order to discharge the burden of proof and he/she may discharge the burden on the basis of the material already brought on record. However, the

accused have failed to discharge the burden and rebut the presumption as discussed above. Moreover, in cross-examination of the complainant, it has come that the accused was known to the complainant from earlier and she used to come at his residence. The cheque amount was given to the accused as her sons wanted to start a factory for which money was needed. The loan was advanced by way of cash. A suggestion was given that only a sum of Rs.3 lacs was paid by the complainant to the accused and her son Hemant. However, this suggestion was denied by him, meaning thereby, it was admitted by the accused that the loan amount was given by the complainant to the accused for the purpose of starting the factory by her sons and separate loans were given by the complainant to them. Furthermore, absolutely no suggestion was given to the complainant that the cheque was not given to the complainant or was given to Chit Fund as a security.

13. Further prior to the filing of the complaint, after the dishonour of the cheque, statutory notice was served upon the accused persons calling upon them to pay the cheque amount. Service of this legal notice has been denied by the accused in their Statement u/s 313 Cr.P.C. However, under Illustration (b) of Section 114 of the

Evidence Act and Section 27 of the General Clauses Act, 1897, service shall be deemed to be effected by properly addressing, preparing and posting by registered post, a letter containing the document and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Although this presumption is rebuttable but mere denial to receive the notice is not sufficient to rebut the presumption. It is for the accused to show that common course of business was interrupted by some supervening circumstances. It is not the case of the accused that the notice was not sent on a correct address or some supervening circumstances existed which prevented ordinary course of business in delivering the notice to the addressee. Moreover, even no suggestion was given to the complainant that legal notice was not served upon the accused. Under the circumstances, it was duly proved by the complainant that on dishonour of cheque, statutory notice was served upon the accused. The accused failed to reply to the statutory notice which leads to the inference that there was merit in the complainant's version.

14. Learned counsel for the respondent has assailed the legality of notice by alleging that the legal notice itself is defective having been

sent on the ground of 'insufficient funds' whereas as per the return memo, it was only on account of "referred to drawer". This submission is without merit as on the back of the cheque itself it has been mentioned that the same has been returned due to "fund insufficient".

15. Result of the aforesaid discussion is that the accused did not raise a probable defence. The defence of giving signed cheque to the Chit Fund Company was demolished by the accused's own witness DW1- Rajesh. Moreover, it was for the accused to prove that even if the signed cheque was given to Chit Fund, how it came in the hands of the complainant. Complainant has deposed that cheque was already filled when it was given to him. Furthermore, the very fact that the accused had failed to reply to the statutory notice u/s 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the accused were not able to contest the existence of a legally enforceable debt or liability. Since the accused did admit their signature on the cheque, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.

16. Thus, on an evaluation of entire evidence on record, this Court finds that the judgment of acquittal passed by the learned Trial Court is erroneous and perverse and is not sustainable both on facts and in law.

17. In the result, both the criminal appeals are allowed setting aside the acquittal recorded by the learned Trial Court and finds both the accused guilty of offence under Section 138 of the Act. Accordingly, in both the appeals, accused are directed to pay a sum of Rs.4,50,000/- each within a period of two months from the date of this order and on failure to pay the said amount, the respondents shall undergo simple imprisonment for a period of six months.

Pending application, if any, also stands disposed of.

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

(SUNITA GUPTA)
JUDGE

JANUARY 13, 2015

RS