

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ **CRL.L.P. 541/2012**

Date of Reserve: 02.12.2015

Date of decision: 09.12.2015

VARUN CAPITAL SERVICES LTD PETITIONER

Through: Mr.Gaurav, Advocate.

versus

RAJESH KUMAR RESPONDENT

Through: Mr.Anurag Dubey, Advocate.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. The present revision petition has been preferred by M/s.Varun Capital Services Ltd through its Managing Director, Rajneesh Gupta, assailing the judgment of acquittal dated 19.09.2012 passed by learned ACMM, East, Karkardooma Courts, Delhi.

2. The petitioner company is a public limited company which is in the business of sale and purchase of shares and commodities on behalf of their clients. The aforesaid company is registered with NSE (Capital Market & F&O Segment).

3. The respondent is a registered client of the petitioner company. The petitioner company had been transacting in sale and purchase of shares in F&O (Derivates Segment) on behalf of the respondent for quite some time. The case of the petitioner is that despite fall in prices in the market, the respondent repeatedly requested the company not to

‘square up’ his account and was asked to continue as well keep intact some of the transactions which were entered into. As a result of such instructions by the respondent, the petitioner company (complainant) suffered losses to the tune of Rs.4,57,563.69/-.

4. In order to discharge the said liability, the respondent is alleged to have issued two cheques bearing Nos.002510 dated 12.07.2007 for an amount of Rs.1 lakh and another bearing No.002511 dated 10.07.2007 for an amount of Rs.2 lakhs. Both the aforesaid cheques were drawn on State Bank of India, Anaj Mandi branch, Shahdara, Delhi (Ex.CW1/5 & 6). On presentation of those cheques by the petitioner company to its banker, the same were returned dishonoured as there were insufficient funds in the account of the respondent. The return memos from the bank are dated 13.07.2007 and 21.07.2007 (Ex.CW1/7 & 8).

5. A demand notice dated 26.07.2007 (Ex.CW1/11) was served upon the respondent. The amount was not paid by the respondent and, therefore, a complaint was lodged by the petitioner under Section 138 of the N.I Act before the competent Court.

6. Rajneesh Gupta, Managing Director of M/s.Varun Capital Services Ltd (Petitioner Company) tendered his evidence by way of affidavit and was also examined as PW-1. During trial he has stated that the respondent repeatedly requested the company not to square up the account. However, in cross examination, he has stated that the respondent did not give him any written instructions not to square up his account or keep intact his transactions.

7. According to the testimony of PW-1, “security margin” amount is normally collected from the client on the very next day when the account of such client shows negative or adverse balance. Security margin is also obtained in advance. It was stated by him that the respondent was not informed in writing about the losses suffered by the company. The respondent was only provided with the contract notes. It was denied by PW-1 that the cheques in question were given by the respondent as security for margins with the understanding that the cheques would be encashed only after the receipt of the consent of the accused in case the margin money was found to be short.

8. The respondent (DW-1) tendered his examination-in-chief by way of affidavit (Ex.DW-1/A). During his cross examination, it was stated by him that he used to give instructions on telephone to the company to deal in shares on his behalf. One Vinod Kumar used to confirm about the finalization of the deals on his behalf. He never received any contract notes and did not have any personal knowledge about whether he was required to make any complaint either to the broker/complainant company or NSE or SEBI. The respondent has denied of there being any outstanding dues as against the company. He had never authorized or consented to such cheques being deposited in the bank. The respondent, during trial, made a grievance of the fact that the complainant company failed to place on record certified/true copies of its balance sheet from the office of ROC for the relevant year which could have showed that the respondent was a debtor for any amount. The acceptance of legal notice also has been denied by the respondent.

9. With regard to the cheques in question, the respondent has in his affidavit stated that in normal course, the cheques are kept by the brokers towards margin and it is the moral duty of a broker to utilize the said cheque only after sending written intimation and of giving detailed statement of account justifying the use of such cheques. Neither any written intimation was given to him nor was he furnished any document to show his liability to pay.

10. In his 313 statement, the respondent has stated that the statement of accounts are not correct and the same are manipulated. Blank cheques were given to the complainant company only with the understanding that in case of excess debt balance in his account, he would be informed and only after his consent, the cheques shall be presented. He has categorically denied of there being any outstanding dues as against the company for which the cheques were issued.

11. The Trial Court did not agree with the contention of the complainant on the ground that PW-1 admitted in his cross examination that no written instructions were given to the company for squaring up or keeping intact the account/transaction of the respondent and has admitted that the “security margin” amount is collected from a client on the very next day, when the account shows negative balance. But, nothing was stated by PW-1 to show as to on how many occasions, security margin money was obtained from the respondent. Even the margin statement account has not been placed on record.

12. The Trial Court took note of the fact that the statement of accounts is furnished by a broker to the investor in a prescribed form along with a contract note. The contract note accounts for the securities purchased or sold, its quantity, rate and the date of transaction. The aforesaid contract note is issued to enable an investor to compare the entries in the contract note with those made in the statement of accounts in order to ascertain the transactions detailed therein.

13. The respondent has denied the supply of contract note. There is no acknowledgement by the respondent of having accepted the copy of accounts. According to the records of the case, it appears that on 31.03.2008 the respondent had gone to the office of the company and received a photocopy of the contract note. An endorsement also was made by the respondent of having accepted the contract note on the same date. Thus the Trial Court was of the view that as per the case of the complainant, the contract note was given only on 31.03.2008 i.e. after the date when the subject cheques are said to have been issued.

14. In order to appreciate the rival contentions of the parties, it is necessary to examine the provisions of Sections 118 (a), 138 and 139 of the N.I.Act.

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 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 ¹[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, ²[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.

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.

15. For the application of provision of Section 138 of the NI Act, 3 ingredients are required to be satisfied, i.e.,

- I. That there should be a legally enforceable debt;
- II. That the cheque should have been drawn from the account of the bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt; and
- III. That the cheques so issued are dishonoured for insufficiency of funds.

16. Under Section 139 of NI Act, unless the contrary is proved, the holder of the cheque shall be presumed to have received the cheque in discharge of any debt or liability.

17. Sub-clause (a) of Section 118 of the NI Act, inter-alia, provides that unless the contrary is proved, the drawn up negotiable instrument, if accepted, has to be presumed to be for consideration.

18. In ***Goa Plast (P) Ltd. vs. Chico Ursula D'souza & Anr., (2003) 3 SCC 232***, the Supreme Court has held that that the provisions of section 138 to 142 of the NI Act, is for the purpose of giving credibility to negotiable instruments in business transactions. In view of section 139 of the NI Act, it had to be presumed that a cheque is always issued in discharge of any debt or other liability. The presumption could be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption.

19. In ***Krishna Janardhan Bhat vs. Dattatraya G. Hegde, (2008) 4 SCC 54***, the Supreme Court had the occasion to deal with the aforesaid provisions of the Act. In the aforesaid decision, the Supreme

Court took the view that Section 139 of the NI Act merely raises a presumption in regard to the cheque having been issued in discharge of any debt or liability but not the existence per se of a legally recoverable debt.

20. However, in *Rangappa vs. Sri Mohan, (2010) 11 SCC 441*, a three judge bench of the Supreme Court held that Section 139 of the NI Act includes the presumption regarding the existence of a legally enforceable debt or liability and that the holder of a cheque is also presumed to have received the same in discharge of such debt or liability. It was clarified in the aforesaid decision that the presumption of the existence of a legally enforceable debt or liability is, of course, rebuttable and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. Without doubt, the initial presumption is in the favour of the complainant.

21. In *Rangappa vs. Sri Mohan (Supra)*, section 139 of the NI Act is stated to be an example of a reverse onus clause which is in tune with the legislative intent of improving the credibility of negotiable instruments. Section 138 of the NI Act provides for speedy remedy in a criminal forum, in relation to dishonour of cheques. Nonetheless, the Supreme Court cautions that the offence under Section 138 of the NI Act is at best a regulatory offence and largely falls in the arena of a civil wrong and therefore the test of proportionality ought to guide the interpretation of the reverse onus clause. An accused may not be expected to discharge an unduly high standard of proof. A reverse onus clause requires the accused to raise a probable defence for

creating doubt about the existence of a legally enforceable debt or liability for thwarting the prosecution. The standard of proof for doing so would necessarily be on the basis of “preponderance of probabilities” and not “beyond shadow of any doubt”.

22. Keeping the above proposition of law in mind, on an analysis of facts, the scale of balance tilts in favour of the respondent. The respondent appears to have successfully rebutted the presumption under Section 139 of the NI Act, namely, the existence of a legally enforceable debt by establishing that the cheques were never given as security margin and no intimation was given to him about the use of such cheques.

23. A Management Information System (MIS) which details each transaction between the broker and the investor and which shows the date, time and volume of transaction undertaken on the instruction of the investor has not been produced by the petitioner company. No evidence also was led to show that the statement of accounts was regularly kept in the course of business. Thus it is difficult to accept, in the absence of any written intimation to the respondent regarding loss of a particular amount, that the cheques which are said to have been issued by the respondent were issued in discharge of any legally enforceable debt.

24. The petitioner company thus has not been able to satisfy the requirements of law in discharging the onus in the second instance regarding the plea of the respondent of no liability or non existence of any legally enforceable debt.

25. Though security cheques are per se not shut out from the ambit of Negotiable Instruments Act but they are in the nature of an acceptance of the fact that in case “debt” crystallizes in to existence and becomes “*in presenti*”, nonetheless the background in which such security cheques are given are of relevance. The claim of the petitioner company falters on the issue of acceptance of security cheques as an intention and decision of the respondent to discharge his obligation to pay. In other words, the petitioner company has not been able to make out a case that the security cheques were issued in discharge of a legally enforceable debt.

26. I do not find any error in the judgment of the Trial Court.

27. Leave declined.

28. Petition is dismissed.

ASHUTOSH KUMAR, J

DECEMBER 09, 2015

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