

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ **CRL.L.P. 103/2015 & Crl. M.A.3565/2015**

Reserved on: 08.12.2015

Date of decision: 18.12.2015

MOHD. ASLAM

..... Petitioner

Through Mr.R.K. Saini, Adv.

versus

RAMESH THAKUR

..... Respondent

Through Mr.Sudhansu Palo &
Mr.Surendra Kr. Roy, Advs.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. The present leave to appeal is directed against the judgment and order dated 14.10.2015 passed by the learned Metropolitan Magistrate (NI Act) South-East District, Saket Courts Complex, New Delhi, in CC No.1278/L whereby the respondent has been acquitted of the charges of Section 138 of the Negotiable Instrument Act (hereinafter referred as NI Act) and the complaint of the leave petitioner has been dismissed.
2. The petitioner is said to have advanced a loan of Rs.2 lacs to the respondent on 03.12.2007 as the respondent had approached him for such loan in order to defray the expenses which were incurred while addressing personal needs. Four post-dated cheques of Rs.50,000/-

each was allegedly given by the respondent. On presentation of one of the cheques namely cheque no.118492, the same was dishonoured with the remark that the 'account has already been closed'. The return memo is dated 12.11.2009. The petitioner thereafter submitted other cheques bearing no.118493; 118494; and 118495, all dated 07.12.1989. These cheques were also returned dishonoured with the remark "Account closed". The return memos of the aforesaid three cheques are dated 09.12.2009 dated 11.12.2009.

3. A legal notice was sent to the respondent.
4. A grievance has been raised that notice was not served upon the respondent.
5. However, when the respondent appeared, he was made to understand the charge against him, to which he pleaded not guilty and claimed trial.
6. The petitioner offered his evidence by way of affidavit (Ex.CW1/1) and his oral testimony before the Court. The respondent got himself examined as DW-1 and also offered another witness on his behalf namely Vimal Kumar Shukla (DW.2).
7. During his cross-examination, the petitioner stated before the Trial Court that he knew the respondent for the last 8-10 years and had been visiting his house for a long time. He gave a loan of Rs.2 lacs to the respondent in the month of December, 2007. The money was demanded by the respondent for treatment of kidney of his wife. The petitioner, however, has categorically stated that such facts namely requirement of money for treatment of kidney of the wife of the

respondent was not stated by him either in his complaint or in the evidence by way of an affidavit. He has submitted before the Trial Court that he also did not state the time period of loan in his complaint petition but the loan was given for a period of two months and no interest was payable as it was a friendly loan. It was further stated by the petitioner that the respondent was not in the trade of selling meat but ran a dry cleaning shop. No proof was available with the petitioner for having given loan to the respondent.

8. The petitioner/complainant has tried to explain the source of money by saying that Rs.55,000/- was available with him in cash and the remaining amount was borrowed from his wife and mother, both of whom are home-makers. It has also been stated that despite his being an income tax payee and having filed his income tax return for the year 2007-08, such loan of Rs.2 lacs has not been shown in his return.

9. The cheque in question was issued by the respondent in the name of the firm namely M/s New Modern Meat Shop. The petitioner claims to be the proprietor of the aforesaid firm. However, neither in the complaint nor in the aforesaid petition, has it been stated that he is the proprietor of M/s New Modern Meat Shop. Such a statement came only by way of an additional affidavit.

10. The respondent, on the other hand, admits of having taken loan from the petitioner but only of Rs.1 lac and not Rs.2 lacs as claimed in the complaint petition. The aforesaid loan was taken on 10% interest per month. The loan was given to the respondent, according to him,

for a period of 3 months. The respondent was made to give four cheques as security for the said loan. The respondent has clearly stated before the Trial Court that he has paid all the amount i.e. Rs.1 lac along with interest of Rs.30,000/- and he did not owe any legal liability towards the complainant. The security cheques which ought to have been returned to the respondent, were actually misused by them. The respondent has stated that the account which he maintained with ICICI Bank, Nehru Place, Delhi, was not closed. The account was operative when the cheques were given to the complainant/petitioner.

11. Vimal Kumar Shukla (DW.2), who appeared for the respondent as a defence witness, has also stated that as against a loan amount of Rs.1 lac which was given by the complainant/petitioner to the respondent, Rs.1,30,000/- was returned, Rs.30,000/- being interest on the loan amount of Rs.1,00,000/-. He has stated that the complainant/petitioner had promised to return the cheques to the respondent but the same was not returned and the same was misused. The money was returned to the petitioner in his presence.

12. Heard the counsel for the parties and perused the records.

13. The complaint petition does not refer to the petitioner as the proprietor of M/s New Modern Meat Shop, though, the address of the respondent has been stated as proprietor of M/s R.S. Enterprises. Even in his evidence, which has been tendered by an affidavit, there is no reference of his being the proprietor of M/s New Modern Meat Shop. He has admitted before the Trial Court that he did not refer to

the fact that he owns a firm under the name and style of M/s New Modern Meat Shop. This lapse on the part of the petitioner does not appear to be inadvertent as the name of the proprietorship firm of the respondent has been stated in the complaint.

14. The payee of the said cheque is M/s New Modern Meat Shop.

15. In *Milind Shripad Chandurkar vs. Kalim M. Khan, (2011) 4 SCC 275*, the Supreme Court has observed that a person can only claim to be the payee of the cheque if his identity is established and is in conformity with the entry made in the column of payee of such cheque.

16. "Payee" as defined under Section 7 of the Negotiable Instrument Act, 1881, it means the person named in the instrument, to whom or to whose order the money is, by the instrument, directed to be paid.

17. "The Holder of the cheque" is the person who is entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

18. Section 9 of the Act defines "Holder in Due Course" as any person who for consideration became the possessor of a cheque if payable to a bearer or the payee or endorsee thereof.

19. The Trial Court has rightly held that the petitioner could not establish himself as the proprietor of M/s New Modern Meat Shop. No evidence has been led by the petitioner to prove the fact that he is the proprietor of M/s New Modern Meat Shop.

20. The case of the complainant becomes doubtful for other reasons as well.

21. The petitioner, admittedly, is an income tax payee and has also filed income tax return for the year 2007-08. There is no reflection of the aforesaid loan in the income tax return. The petitioner and the complainant are also not in the same trade.

22. The case of the respondent, on the other hand, is strengthened by the deposition of DW.2 who has in unequivocal terms has stated that it was at his instance that the respondent had come in contact with the petitioner. DW.2 had also taken loan from the petitioner sometimes ago. The loan which was given to the respondent was returned in his presence along with interest of Rs.30,000/-.

23. The cheque which was presented by the petitioner for encashment, therefore, was not issued in discharge of any legal liability.

24. Though security cheques fall within the ambit of section 138 of the NI Act but in the present circumstance, there is paucity of evidence with regard to the petitioner having advanced a loan to the respondent and that the cheque was issued by the respondent in discharge of such debt. There appears to be stronger evidence in favour of the respondent whose contention before the Court is that the debt had already been discharged.

25. In order to further appreciate the contention of the parties, it is of extreme importance to examine the provisions of Section 118(a), 138 and 139 of the NI 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.

26. For the application of provisions of section 139 of the NI Act, three 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 presupposes a legally enforceable debt; and
- iii. the cheque so issued is dishonoured for insufficiency of funds.

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

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

29. 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.

30. 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.

31. 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.

32. 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”.

33. Keeping the above proposition of law in mind, on an analysis of the facts, the scale of balance tilts in favour of the Respondent (accused). The Respondent has successfully rebutted the presumption under Section 139 of the NI Act of the existence of a legally enforceable debt by establishing that the loan of Rs.1 lac and the same was returned to the petitioner in front of DW.2.

34. The petitioner, on the other hand, could not satisfy the requirement of law in discharging the onus, in the second instance, regarding the plea of the Respondent of no liability or non-existence of legally enforceable debt. The argument advanced on behalf of the petitioner that the complainant ran a meat shop which is an expensive item, it was not very difficult for him to have arranged for Rs.2 lacs for giving loan to the respondent, is flawed and is deficient for making out a case of discharge of the onus.

35. The petitioner has taken a contradictory stand in his deposition before the Court that he had arranged the money with the help of his wife and mother who are home makers. The contention of the petitioner that he successfully proved himself to be the proprietor of M/s New Modern Meat Shop by way of an additional affidavit cannot be accepted. There is no such reference either in the complaint or in his evidence before the Trial Court.

36. The argument of the petitioner that if, as stated by the respondent, loan was only for Rs.1 lac and that too, stood repaid, the respondent ought to have taken some legal steps for getting back the security cheques, does not have any legs to stand. If that were the

accepted logic in friendly/business dealings, the petitioner too was required to keep proof of the fact that the loan was being advanced to the respondent.

37. Thus, the petitioner has miserably failed to prove his case at the trial.

38. This Court does not find any fault with the judgment acquitting the respondent.

39. Consequently leave to appeal is declined.

40. Petition is dismissed but without costs.

Crl. M.A.3565/2015

1. In view of the petition having been dismissed, no orders are required to be passed in the instant application.

2. Dismissed as infructuous.

ASHUTOSH KUMAR, J

DECEMBER 18, 2015
ab