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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.REV.P. 644/2013 & Crl.M.B.2267/2013 (Suspension of Sentence)

HARISH KUMAR ..... Petitioner

Through: Mr.U.S.Chaudhary with Mr. Vipin Chaudhary, Advs.

versus

VIKAS VIRMANI ..... Respondent

Through: Mr. Rajinder Kr. Uppal, Adv.

**CORAM:**
**HON'BLE MR. JUSTICE ASHUTOSH KUMAR**

**O R D E R**

**% 25.08.2017**

Harish Kumar, the petitioner, was convicted by the learned Civil Judge-1/MM, New Delhi District, Delhi vide judgment dated 12.10.2012 under Section 138 of the Negotiable Instruments Act, 1881 in CC No.1022/11 and by order dated 17.10.2012 was directed to suffer confinement in court till its rising and was further directed to pay an amount of Rs.4 lakh as compensation to the respondent/complainant. In the event of default by the petitioner, he was directed to further suffer SI for six months.

As against the aforesaid judgment and order of conviction and sentence the petitioner preferred an appeal vide CA No.203/12 which was dismissed by the judgment dated 05.10.2013 passed by the learned District & Sessions Judge, South East: Saket Courts: New Delhi.

The petitioner seeks to assail the aforesaid two concurrent judgments of the courts below.

The respondent/complainant has alleged that as a dealer of diamonds, he had sold certain loose diamonds to the petitioner through one Dinesh Jain who was also made an accused in the complaint but later dropped. The aforesaid Dinesh Jain became a grantor for the timely payment of money by the petitioner who was paid 2% sale commission by the respondent/complainant.

It is further alleged that the petitioner took diamonds from the respondent for a cost of Rs.3,12,000/- on 05.03.2006 on credit for a period of 60 days i.e. till 05.05.2006. To instil confidence in the respondent, the petitioner also issued a post dated cheque No.028013 dated 05.05.2006 for the amount of Rs.3,12,000/-, drawn on United Bank of India, Chandni Chowk, New Delhi with an assurance that it would be encashed on its presentation. The petitioner had also agreed, at the time of taking the diamonds, that in the event of any default in the payment on due date, he shall pay an interest @2% per month. The payment was not made on the due date and on the asking of the respondent, the petitioner permitted the cheque to be presented in bank. The cheque was presented on 02.08.2006 for encashment but it was dishonoured for insufficiency of funds. Hence, the complaint was filed.

The complaint as against Dinesh Jain was dismissed because of insufficiency of any material against him.

At the trial, the respondent produced himself as CW1 and also tendered his evidence by way of affidavit (Ex.CW1/1). He was thereafter cross-examined.

The petitioner got himself examined as DW1 and also tendered his evidence by way of affidavit (Ex. DW1/A) and was cross-examined. On his behalf, one Subhash Gulati, an officer of the United Bank of India, Chandni Chowk also appeared before the court as DW2 and presented the passbook of Account No.0274010117884. He also produced the account opening form of the aforesaid account. The petitioner, in his statement made under Section 313 Cr.P.C., stated that he does not deal in the diamonds and in fact does not even know the respondent/complainant. The cheque according to the petitioner was misplaced which has been misused by somebody.

It was argued on behalf of the respondent before the trial court that the signature on the cheque in question (Ex.CW1/A) was admittedly of the petitioner and therefore there was a presumption of the cheque having been issued by him in discharge of his liability. Such presumption, as claimed by the respondent, could not be rebutted. On behalf of the petitioner, objection was raised with respect to the issuance of notice to him. The case of the petitioner before the trial court was that no legal notice was served upon him as notice was sent under wrong address. It was also urged that assuming that legal notice was served upon him, the respondent/complainant could not show any transaction between him and the petitioner prior to issuance of cheque and therefore the requirement of proving the existence of a recoverable debt could not be met by the respondent/complainant.

The trial court on finding that bailable warrants issued by the court were executed on the same address which was mentioned in the legal notice and the evidence of the postal receipts (Ex. CW1/D1) and (Ex. CW1/E) came to the conclusion that there was a presumption under Section 27 of the General Clauses Act that legal notice was served upon the petitioner. The petitioner has also admitted his signature in Ex. DW1/C1.

Since no probable defence could be raised by the petitioner at the trial, rebutting the presumption under Section 139 of Negotiable Instruments Act, the trial court convicted the petitioner, sentenced him to undergo imprisonment till the rising of the court and directed him to pay compensation of Rs.4 lakh in default of which the petitioner was required to suffer SI for six months.

The same grounds were taken by the appellate court for dismissing the case of the petitioner.

It has been submitted on behalf of the petitioner that the slip (Ex. DW1/C1) which contained an endorsement from the petitioner regarding the existence of a liability of Rs.3,12,000/- was neither stated in the complaint nor in the affidavit of evidence and therefore it could not have been produced in the evidence before the trial court.

It was further averred that both the courts below did not take into account that there was no prior transaction between the petitioner and the respondent. It was, thus, argued that in view of the reverse onus clause in the Negotiable Instruments Act, once, it was denied by the petitioner that he had issued any cheque in favour of the respondent/complainant, it was incumbent upon the respondent to explain and prove the existence of an enforceable/existing debt.

True it is that the presumption under Sections 118(a) and 139 of the Negotiable Instruments Act is rebuttable and it is not necessary for an accused to prove beyond all reasonable doubts that no such liability existed. Nonetheless, at least a probable defence has to be furnished for the trial court to insist upon the complainant to prove his case. No effort has been made by the petitioner to explain the presence of his signature on the cheque. Merely by giving a bald statement that he does not know the respondent/complainant, the statutory presumption would not be rebutted. Even if the slip (Ex. DW1/C1) which bears his signature and which is an indication of the existence of the debt was not pleaded in the complaint or in the affidavit of evidence, the petitioner cannot escape the liability of explaining as to how the cheque which bears his signature was misplaced and what efforts were made by him to have the same traced.

Thus, the trial court as well as the appellate court had no option for them but to convict the petitioner and sustain the conviction respectively.

This court finds no reason to interfere with the concurrent judgments of the courts below.

The revision petition is dismissed.

**ASHUTOSH KUMAR, J**

**AUGUST 25, 2017**
**ns**