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

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Judgment Reserved on: 24.08.2017

Judgment Pronounced on: 27.09.2017

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CRL.A. 371/2017

GURDIP SINGH ANAND

..... Appellant

Through: Mr. Sagar Saxena, Advocate.

versus

JOSEPH DANIEL

..... Respondent

Through: Mr. Atul Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. Challenge in this Criminal Appeal is to impugned judgment dated 10.08.2015 passed by the learned Metropolitan Magistrate, South East District, Saket Courts, New Delhi in Complaint Case No.545/2013 whereby the respondent was acquitted for the offence under Section 138 of the Negotiable Instruments Act, 1881 (in short 'NI Act')
2. The appellant and the respondent entered into a loan agreement dated 01.04.2011 whereby a sum of Rs.2,00,000/-was granted as loan to the respondent who assured the appellant that the loan amount would be repaid till December, 2011.

3. In December, 2011 the appellant demanded the loan amount from the respondent who in order to discharge his liability issued and handed over a cheque bearing no.965528 dated 27.12.2011 for a sum of Rs.2,00,000/- drawn on the State Bank of India, Rail Bhavan, Rafi Marg, Delhi in favour of the appellant. This cheque was dishonoured for the reason “Funds Insufficient” vide memo dated 28.12.2011. The appellant served a legal notice dated 16.01.2012 upon the respondent by speed post/courier under Section 138 of the NI Act. However, no payment was made by the respondent which led the appellant to file the present complaint.
4. The Trial Court acquitted the respondent as it found that the cheque in question was issued as security at the time of entering into the loan agreement dated 01.04.2011.
5. Learned counsel for the appellant contended that a case where a cheque given as security is subsequently dishonoured would be covered under Section 138 of the NI Act. He relied heavily on the judgment by Single Bench of this Court in ***Credential Leasing & Credits LTs. Vs Shruti Investments & Anr. 2015 (151) DRJ 147*** where it was held as under:-

“30. Thus, I am of the considered view that **there is no merit in the legal submission of the respondent accused that only on account of the fact that the cheque in question was issued as security in respect of a contingent liability**, the complaint under Section 138 of the NI Act would not be maintainable. At the same time, I may add that **it would need examination**

on a case to case basis as to whether, on the date of presentation of the dishonoured cheque the ascertained and crystallised debt or other liability did not exist. The onus to raise a probable defence would lie on the accused, as the law raises a presumption in favour of the holder of the cheque that the dishonoured cheque was issued in respect of a debt or other liability. As settled by the Supreme Court, the said onus obliges the accused to raise a defence - either by picking holes in the case of the complainant and/or by positively leading defence evidence which leads the Court to believe that there is a probable defence raised by the accused to the claim of the complainant with regard to the existence of the debt or other liability. The said onus does not cast as stringent an obligation on the accused, as it casts on the complainant, who has to prove beyond reasonable doubt the guilt of the accused."

6. Learned counsel further contended that the loan agreement dated 01.04.2011 between the appellant and the respondent clearly establishes the liability of Rs.2,00,000/- which the respondent had to discharge in favour of the appellant. He urged that the agreement was signed by both the parties and therefore their veracity cannot be challenged only by making statements to the contrary, particularly when the respondent had also executed an affidavit to this effect on the same day.
7. He urged that the cheque in question was unquestionably signed, dated and given to the appellant in discharge of his legal liability by the respondent which was dishonoured vide memo dated 28.12.2011 and therefore Section 138 of the NI Act is attracted as all ingredients of this section were undoubtedly met.

8. Per contra, learned counsel for the respondent had contended that the judgment of the Trial Court does not suffer from any illegality and therefore no interference is called for.
9. He argued that the appellant had given him a loan of Rs.1,76,000/- only. He argued that the cheque in question was given to the appellant as security at the time of grant of loan and it was only bearing his signatures and the rest of the details in the cheque were filled up by the appellant himself.
10. He contended there was no legally subsisting liability on the date on which the cheque was handed over to the appellant and therefore the provisions of Section 138 of the NI Act are not attracted as rightly held by the Trial Court.
11. I have heard the learned counsel for the parties and gone through the record of the case.
12. It is not in dispute that the respondent had taken loan from the appellant, what is in dispute is the amount which was advanced as loan to the respondent and consequently what was the outstanding amount. The appellant contended that as per the loan agreement dated 01.04.2011, he advanced a loan amount of Rs.2,00,000/- whereas the respondent contended that only a loan of Rs.1,76,000/- was advanced to him by the appellant.
13. It is important at this juncture to refer to Section 118 and 139 of the NI Act:-

“118. Presumptions as to negotiable instruments Until the contrary is proved, the following presumption 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, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date - that every negotiable instrument bearing a date was made or drawn on such date;”

“139. Presumption in favor 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, or any debt or other liability.”

14. The Hon’ble Supreme Court in ***Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal***, (1999) 3 SCC 35 while dealing with the nature of presumption under Section 118 of the NI Act held as under:

“12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case

including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist. We find ourselves in the close proximity of the view expressed by the Full Benches of the Rajasthan High Court and the Andhra Pradesh High Court in this regard.”

(emphasis supplied)

15. It is clear after going through Sections 139 and 118 of the NI Act and the judgments of the **Hon'ble Supreme Court** in ***Bharat Barrel's case (supra)*** that once the factual basis for raising the presumption under Sections 139 and 118 of the NI Act have been satisfied, a Court is bound to draw the presumption of law. This presumption is rebuttable by the accused as has been stated in ***Bharat Barrel's case (supra)*** by either bringing on record such evidence which would make a reasonable and prudent person believe the existence of such

liability to be improbable or illegal or by relying on the evidence produced by the complainant itself.

16. The appellant has relied upon the Loan Agreement dated 01.04.2011 Ex.CW1/F and for the disposal of this appeal it is important and relevant to refer to certain relevant portions thereof which read as under:

“LOAN AGREEMENT

This Loan Agreement is made and executed at Delhi on this 1st April 11 Between:-

Sh. Gurdip Singh Anand hereinafter called as Lender/First Part

And

Mr. Joseph Daniel son of late Shri L. Joseph R/o Flat No.1022, R.K. Puram, Sector-7, New Delhi-110022 (hereinafter called the Borrower/Second Party)

.....
WHEREAS the lender has agreed to give the loan of Rs.2,00,000/- to borrower on flat interest rate of 2% per month.

.....
1. That the **borrower hereby acknowledges that he has received the loan of Rs.2,00,000/- from the LENDER. A separate receipt of said loan amount of Rs.2,00,000/- is executed by the borrower.**

2. That the borrower hereby assures the **lender that he will pay back the loan amount of Rs.2,00,000/- along with interest @ __ per month** as per the Schedule to Loan Agreement.

3. That in support of the present Loan Agreement, **the borrower has also executed a promissory note, an undertaking/affidavit in favout of the lender, further the borrower has also handed over the post-dated cheque of Rs.2,00,000/- bearing no.965528 dated 27.12.11, drawn on SBI, Rail Bhawan.** The lender has given the said loan to the borrower for the fix period of Three months/upto Dec 2011 from the date of

Agreement. After Three months/or upto Dec 2011 the lender will present the said cheque amounting to 2,00,000/-. Thus the **said amount of loan includes the principal amount of Rs.2,00,000/- and interest amount of Rs. 2% per month.”**

17. As per the recital to the Loan Agreement, the appellant had agreed to give loan of Rs.2 lacs to the respondent on interest @ 2% per month. As per the term and condition no.1 of the agreement, the respondent has confirmed having received Rs.2 lacs from the appellant and executed a Receipt, Promissory Note and Undertaking/Affidavit. However, as per term and condition no.3 the loan amount of Rs.2 lacs was inclusive of interest @ 2% per month. It is also reflected that the cheque in question was given at the time of execution of Loan Agreement.
18. As per the Loan Agreement the amount of loan of Rs.2 lacs includes interest @ 2% per month. In his complaint, the appellant pleaded to have advanced Rs.2 lacs to the respondent. But the appellant in his cross-examination deposed that he advanced a loan to the respondent by cheque for Rs.1,76,000 and by cash Rs.24,000/-. The respondent had testified that he had taken a loan of Rs.1,76,000/- only by way of cheque from the complainant. The testimony of the appellant in his cross-examination is in contradiction to the loan agreement where it is mentioned that the respondent acknowledged that he had received a sum of Rs.2,00,000/-. Loan Agreement itself contains contradictory facts. In a Para it is mentioned that a

loan of Rs.2,00,000/- was given to the respondent, which was acknowledged by him. In another para it is mentioned that loan amount of Rs.2,00,000/- includes interest @ 2% per month. The testimony of the complainant in his cross-examination is also contradictory to the stand taken by the complainant in his complaint where he pleaded that he had advanced a sum of Rs.2,00,000/- to the respondent. He did not plead in the complaint that he advanced Rs.1,76,000/- by cheque and Rs.24,000/- by cash or that Rs.2 lacs is inclusive of interest portion.

19. As has been laid down in ***Bharat Barrel's case (supra)***, the respondent can rebut the presumption under Sections 139 and 118 of the NI Act by raising a probable defence. The respondent in doing so can either bring in his own evidence or rely upon the evidence submitted by the appellant. In the present case the respondent deposed that he had only received by way of loan from the appellant an amount of Rs.1,76,000/-. This assertion without any proof is not likely to go very far in raising a probable defence, but the appellant himself admitted that a cheque for the sum of Rs.1,76,000 and cash Rs.24,000/- was paid to the respondent, strengthens the defence of the respondent. Even this stand in cross-examination by the appellant is contradictory to the agreement which mentions that loan amount of Rs.2 lacs includes interest.

20. The fallacy in the appellant's case is also brought from the fact that the loan agreement mentions that a post-dated cheque for the amount of Rs.2,00,000/- bearing no.965528 dated 27.12.11 drawn on SBI, Rail Bhawan was handed over to the appellant at the time of execution of the loan agreement but in his complaint as well as in his evidence, the appellant had stated that the said cheque was handed over to him after he raised a demand for repayment of the loan amount to the respondent in December of 2011.
21. The controversy whether a cheque given as security can be brought within the purview of Section 138 of the NI Act does not arise here as a cheque has to be issued for the amount which is due to the holder of the cheque. The various contradictions in the appellant's version has put a serious doubt as to whether there exists a legally subsisting liability of Rs.2 lacs in favour of the appellant. The various inconsistencies in the stand taken by the appellant leads the Court to believe that the existence of the liability to be highly improbable.
22. Since the appellant was not able to prove the amount of Rs.24,000/- allegedly paid by cash to the respondent as loan along with a cheque of Rs1,76,000/-, the cheque in question which was for the amount of Rs.2,00,000/- can in no way be said to have been issued for the legally existing liability of Rs.1,76,000/-.

23. In the facts and circumstances of the case and in light of the judgments of the Hon'ble Supreme Court, I find no infirmity in the judgment of the Trial Court and therefore this Criminal Appeal is dismissed.

(VINOD GOEL)
JUDGE

SEPTEMBER 27, 2017

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