

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

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Reserved on: 08.08.2017

Delivered on: 22.08.2017

+ CRL.A.398/2017

VEENA

..... Appellant

versus

STATE & ANR.

..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr.Vijay Kinger.

For the Respondent No.1 : Mr.Arun Kr.Sharma, APP.

For the Respondent No.2 : Ms.S.R.Padhy, Adv.

CORAM:-

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. The appellant/complainant is aggrieved by the judgment dated 29.11.2016 passed in Crl.Appeal No.1216/2016 by the learned Additional Sessions Judge, Shahdara District, Karkardooma Courts, Delhi whereby the judgment and order of the Trial Court dated 08.09.2016/01.10.2016 convicting the respondent under Section 138 of the Negotiable Instruments Act and sentencing him to undergo SI for six months, to pay a compensation of Rs.3,00,000/- (Rs.3 lakhs) and in default of which to further undergo SI for six months, has been set aside and the respondent has been acquitted of all charges.

2. The appellant is said to have given Rs.5 lakhs to the respondent as family loan which was promised to be returned within two months. The complaint filed by the appellant inter-alia states that Rs.2 lakhs was paid to the appellant by the respondent towards the discharge of the liability against the aforesaid family loan. The cheque in question of Rs.3 lakhs, i.e. the balance amount, when presented before the bank by the appellant, was dishonoured because of insufficiency of funds. A legal notice dated 15.04.2009 was sent through registered A.D post and UPC on 17.04.2009. Since no payment was made by the respondent, the subject complaint was lodged by the appellant.

3. The Trial Court, on perusal of the deposition of the witnesses and the records of the case, was of the view that there was existence of an enforceable debt, in discharge of which the subject cheque was issued by the respondent which was dishonoured. The respondent was held guilty under Section 138 of the Negotiable Instruments vide judgment dated 08.09.2016 referred to above and by order dated 01.10.2016, he was sentenced to undergo SI for six months, to pay a compensation of Rs.3,00,000/- (Rs.3 lakhs) and in default of which to further undergo SI for six months.

4. Before the lower Appellate Court, it was argued on behalf of the respondent that in the complaint, the appellant had talked about giving family loan of Rs.5 lakhs to the respondent, but in the cross-examination before the Trial Court, she changed her stand and said that the amount was actually paid for purchasing a flat from the respondent. The other ground which was raised before the lower Appellate Court was that there was no legal notice/demand notice

issued by the appellant in respect of the cheque; there was no agreement, receipt of cash or any other document in support of the contention of the appellant of having paid such amount towards purchase of flat; a wrong cheque number was stated in the complaint which was never produced nor proved and that the respondent had paid substantial amount to the appellant and her husband, even prior to the presentation of the cheque in question in the bank. The respondent had argued that the appellant could not specify the date, time and place of the grant of loan and that a complaint was made by the respondent on 24.08.2008 about missing of five cheques, one being the subject cheque, whereas the date of issuance of the subject cheque was 15.11.2008 i.e after the report regarding missing of such cheque was lodged by the respondent.

5. The lower Appellate Court accepted the arguments of the respondent herein, allowed the appeal and acquitted the respondent of all charges vide judgment dated 29.11.2016.

6. The cheque in question does bear the signature of the respondent and, therefore, there is an initial presumption under Sections 118 and 139 of the Negotiable Instruments Act of the cheque having been issued in discharge of a legally enforceable debt and the existence of such a debt.

7. That a wrong cheque number was stated in the complaint may not be the end-all and be-all of the case of the appellant/complainant. The other factors also are required to be seen to decide as to whether the appellant/complainant has been able to prove his case. The original cheque was placed before the Trial Court and the same was proved as

Exh.CW/A. Thus the wrong number of the cheque in the complaint would not make any difference and has to be taken as a typographical/inadvertent mistake.

8. No defence was led by the respondent but in his statement under Section 313 of the Code of Criminal Procedure, the respondent denied of having taken any family loan of Rs.5 lakhs from the appellant/complainant. The factum of issuance of cheque in question towards repayment of that loan has also been denied. On the contrary, the plea of the respondent is that he had come into contact with the husband of the complainant sometimes in the year 2007-2008 and because of the proximity which had developed between them, the respondent had paid a substantial amount at different times to the husband of the complainant on demand for the purpose of B.Ed education of the appellant/complainant. In his 313 statement, the respondent has stated that the complaint was lodged with regard to missing of leaves of cheque book which contained the subject cheque also.

9. It would now be necessary to analyze the statement of the appellant/complainant. In the complaint, it has been averred that she had given a family loan of Rs.5 lakhs to the respondent and out of the aforesaid amount, Rs.2 lakhs had been returned to her. The cheque was only issued with respect to the balance amount of Rs.3 lakhs. During the cross examination, however, a different stand was taken by the appellant/complainant and it was deposed that the appellant wanted to purchase a flat from the respondent and the money was given by her for the aforesaid purpose. She has further stated that the

total cost of the flat was Rs.5 lakhs. She did not know as to where the flat was situated. There was no specification regarding the year, date, time and place of giving of the aforesaid Rs.5 lakhs as loan. There are apparent contradictions in the statement made in the complaint petition and the deposition of the appellant. With respect to the source of the money, the appellant stated that half the amount was from her income from the tuition whereas the rest of the amount was her savings. She had also taken some amount, according to her deposition, from Dr.Virender Singh (CW-2). She has admitting of having accepted a cheque of Rs.50,000/- in her and her husband's name.

10. The lower Appellate Court, therefore was absolutely justified in holding that the statement of the appellant/complainant was redolent with doubt and suspicion. The statement regarding purchase of flat was introduced for the first time in trial. The two pleas of the appellant/complainant, therefore, is mutually contradictory and cannot be believed. If the averments in the complaint are taken into account, the family loan given by the appellant was repayable in two months. If the stand taken by the appellant in her deposition is accepted to be correct then she had paid the money towards purchase of the flat. If at all, the money was given for purchase of flat, where was the question of return of Rs.2 lakhs in the first instance and ultimately the return of the entire amount. If the agreement to purchase the flat did not materialize, requiring the respondent to repay the amount, this fact had necessarily to be proved by the appellant/complainant which she has not done.

11. It would be necessary in this context to refer to the provisions of Sections 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, [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."*

12. From a bare reading of the Sections referred to above, it is apparent that in a trial under Section 138 of the Negotiable Instruments Act, a presumption has to be drawn that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability. No sooner the complainant discharges the burden to prove that the instrument was executed by the accused, the rules of presumption under Section 118 and 139 of the Act would ensure that the burden to prove to the contrary would be on the accused. The presumption will survive till the time the contrary is proved by the accused i.e. the cheque was not issued for consideration and in discharge of any debt or liability.

13. In Section 118 of the Act, the phrase "unless the contrary is

proved” is similar to the one used under Section 139 of the Code and, therefore, such presumption is rebuttable.

14. An accused in a trial under Section 138 of the Negotiable Instruments Act can either show the non existence of any consideration and debt or could prove that the case of the complainant was absolutely unbelievable. This is how the presumption under Section 118 and 139 could be rebutted. Times without number, it has been clarified by the Supreme Court that to rebut the statutory presumption, an accused is not expected to prove his defence beyond reasonable doubt as is expected in a criminal trial. The offence under the Negotiable Instruments Act is merely a regulatory measure. In that event, an accused could either adduce direct evidence to prove the non existence of any debt or the liability or could do the same indirectly by pointing out fallacies in the prosecution version.

15. There cannot be an insistence on an accused to lead evidence for rebutting the presumption.

16. In **Rangappa vs. Mohan**, AIR 2010 SC 1898, the Supreme Court has very succinctly laid down as follows:-

“14. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable

debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. 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. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, 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. As clarified in the citations, the accused can rely on the materials submitted by the complainant and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

17. This Court finds that even though the respondent has not led any evidence but the statutory presumption in favour of the appellant/complainant stands rebutted because of the inconsistent plea of the appellant/complainant.

18. The lower Appellate Court rightly took into account the aforesaid facts and additionally the claim of the respondent that he had lost some leaves of the cheque book including the subject cheque and for which a complaint also was lodged earlier.

19. The Lower Appellate Court was absolutely justified in holding that the complainant could not prove her case regarding the existence of any legally enforceable debt against the respondent.

20. This Court does not find any plausible reason for interfering with the order of the Lower Appellate Court.

21. The appeal is thus dismissed.

ASHUTOSH KUMAR, J

AUGUST 22, 2017

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