$~26

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

\+ **CRL.L.P. 612/2017 & Crl. M.A.Nos.17353-54/2017**

VIVEK KUMAR GAUR ..... Petitioner

Through: Mr. Vikas Sharma and Mr. Sanjay Garg, Advocates.

Versus

STATE GOVT OF NCT OF DELHI & ORS. .....Respondents

Through: Mr. Tarang Srivastava, Additional Public Prosecutor for the State.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

O R D E R

% 26.10.2017

Crl. M.A. No.17353/2017 (for exemption)

Allowed, subject to all just exceptions.

The application stands disposed off.

CRL.L.P. 612/2017 & Crl. M.A.No.17354/2017 (for delay)

The petitioner seeks leave to appeal against the order dated 06.07.2017 passed by the learned Metropolitan Magistrate, Karkardooma Courts, Delhi, dismissing his complaint under Section 138 of the Negotiable Instruments Act, 1881.

The petitioner had sought prosecution against the second and third respondents for the non-encashment of a cheque amounting to Rs.3,50,000/-, since a stop payment order had been made then. According to the petitioner, the proprietor of M/s. Virgo Technologies, the said cheque was issued for the development of a website for M/s Add My India Trip.

On the other hand, the respondent's case is that the said cheque was issued as a security amount and not towards payment of debt. Therefore, the cheque issued would be payable only when the service had been fully rendered. The Trial Court recorded that since the services had not been duly rendered, hence payment against the said cheque had been stopped.

It was never the case of the respondent that the said amount was due to the petitioner or that the cheque was not encashed on account of 'insufficiency of funds'. The impugned order, in particular records as under:-

> *"18. Thus, as can be seen, both accused have taken a three point defence, to rebut the case of the complainant. Let us now examine whether accused have been able to prove their defence even to the extent of balance of probabilities or not. Firstly, it is the defence of the accused persons that they have already made payment of Rs. 1,16,250/- for services given by the complainant till 22.06.2013. In order to prove this, CW-1 during his cross-examination was confronted with the details of the payment made by the accused persons. The details of the payments are placed on record as Ex. CWl/l-Al. Complainant stated that he could not recollect the payment made by the accused persons as per Ex. CWl/l-Al. However, he did not deny the payments made by the accused as reflected in Ex. CWl/l-A-1. Also DW-2 in his examination-in-chief stated that payment for the services provided by the complainant, was made to the account of the mother of the complainant and to the account of Rediff Hosting Solutions and Virgo Technologies. Complainant in his cross-examination has admitted receiving payments in the account of his mother as well as payment by cash. CW-1 in his cross-examination has also admitted that in his complaint he has not disclose about the payment's made by the accused persons to the bank account of his mother Smt. Sarla Gaur, to the account of Rediff Hosting Solutions owned by his brother and to Virgo Technologies. CW-1 further in his cross-examination stated that he could not say if as per document Ex. CWl/l-Al he had collected payment of Rs.5,04,356/- from the accused persons. These submissions by the complainant hints at the fact that he had received payments from the accused persons, which fact has not been disclosed by him in his complaint as well*

as evidence by way of affidavit. This casts doubts about the credibility of the complainant's story.

19. Furthermore, accused in order to probablize the defence taken above, during arguments pointed out that account statement of accused no.3 which is Ex. DW3/5 reflects the payments made by the accused persons in the account of Rediff Hosting Solutions as well as Smt. Sarla Gaur. As per Ex. DW3/5 payment of Rs. 15,000/- by way of cheque bearing no. 421975 has been made to the account of Rediff Hosting Solutions on 11.05.2012. Payment of Rs. 10,000/- each by way of cheque bearing no. 447201 & bearing no. 473455 to the account of Rediff Hosting Solutions has been made on 13.06.20l2 & 01.02.2013 respectively. Further another payment of Rs.15,000/- by way of cheque bearing no. 473475 to the account of Rediff Hosting Solutions has been shown to be made on 13.03.2013. Similarly payment of Rs.10,000/- to the account of Smt. Sarla Gaur is shown to be made by way of cheque bearing no. 473469 on 27.02.2013. Further payment of Rs.26,000/- & Rs.20,000/- by way of cheque bearing no. 487667 and cheque no. 487668 respectively is shown to be made to Ms. Sarla Gaur on 11.05.2013 & 16.05.2013 respectively. Another payment of Rs.58,000/- by way of cheque bearing no. 487684 to Ms. Sarla Gaur on 17.05.2013 is also reflected in account statement Ex. DW3/5. Thus, as per Ex. DW3/5 payment of Rs. 50,000/- has been made into the account of Rediff Hosting Solutions and Rs. 1,14,000/- to the account of Ms. Sarla Gaur, by the accused persons. Hence, total payment of Rs. 1,64,000/- has been shown to be made by the accused to the account of the brother and mother of the complainant. Apart from these payments complainant has also admitted receiving cash payments from the accused, which he has not mentioned in his complaint, or evidence by way of affidavit. No explanation, as to why these payments have been made, has been given by the complainant. Neither has he stated that these payments were for discharge of some other liability. Hence, in view of the above it is safe to assume that these payments were made by the accused persons to the complainant for the internet domain services rendered to the accused.

20. The case of the complainant further becomes doubtful in view of his following testimony during his cross-examination:

> *" I have not maintained the ledger of the accused firm in my books of account. I do not maintain also the books of account. I have not filed any document to show that I have provided the service package of Rs.50,000/- to the accused persons. 1 have not placed any document to show that Rs.1,16,250/- is due upon the accused firm except my copy of email. It is wrong to suggest that I have not done the work for Rs.50,000/- and Rs.1,16,250/- for accused persons, as mentioned above, that is why I have not placed any document in that record on record."*

The above submission of the complainant becomes important in view of the fact that accused has already shown payment of Rs. 1,64,000/- to the complainant. Moreover DW-2 in his examination-in-chief stated that they have paid entire amount for the services provided by the complainant and had also requested the complainant to supply invoices for the same, which the complainant failed to provide. CW-1 in his cross-examination has admitted that he has not issued any bill/ invoice with regard to the present dealings and apart from the copy of email he has not placed on record any document to show that Rs.l,16,250/- is due upon the accused firm. In his explanation he has further stated that everything is on email and the accused persons had not demanded the bills. Moreover nothing has been placed on record by the complainant to show that he had provided service package of Rs.50,000/- to the accused persons. Accused persons during their statement u/s 313 Cr.P.C had stated that they had not authorized services of Rs.50,000/- allegedly given by the complainant and hence are not liable for the same. The copy of emails which are placed on record as Ex. CWl/A to Ex. CWl/E can also not be relied upon as the same are not supported by any certificate U/s 65-B of the Indian Evidence Act. Also no reply of the emails sent to the accused persons, has been placed on record to show that accused persons have admitted their liability for the *amount mentioned in the email. Thus in view of the above, the story of the complainant becomes inconclusive & vague.*

21. Let us now move further to examine the next defence taken by the accused. Complainant in his complaint as well as evidence by way of affidavit stated that on request and demand of accused no. 1 & 2 he had transferred an amount of Rs.84,000/- and Rs. 1,00,000/- to the account of the accused persons on 24.07.2013 & 22.08.2013 respectively. Complainant however, in his complaint chose to remain silent on why the amount was transferred to the account of the accused persons. Also interestingly, while on one hand complainant claims an amount of Rs. 1,66,250/- is due from the accused persons, on the other hand, he transfers an amount of Rs. 1,84,000/- to the account of the accused without disclosing any reason. It is the accused who in their statement U/s 313 Cr. PC have explained why this amount was transferred to their account. Both accused stated that this amount was transferred by the complainant as investment in the partnership namely Travel O Time, started between the complainant, his brother Dhruv Gaur and accused persons. Accused no. 2 in his examination in chief also stated the same. CW-1 in his cross-examination admitted that one partnership in the name of M/s Travel O Time was started with the accused persons in the month of August 2015. He also stated that his brother Dhuru Gaur was the managing partner of the partnership firm and admitted that he had not disclosed this fact in his complaint. However, complainant in his cross-examination simply denied that amount of Rs. 1,84,000/- was transferred as investment in the partnership firm. He in his cross-examination stated that the payment of Rs. 84,000/- was demanded by the accused persons to make payment to M/s GTI Travels, Laxmi Nagar, Delhi and Rs. 1,00,000/- was transferred by accused persons to one person namely Mr. Mayank Pandey as well as some other persons. No document, has been filed by the complainant to support his submissions. Also this submission by the complainant is highly outlandish as no prudent person would advance an amount of Rs. 1.84,000/- to his debtor, for advancing the same further, when he already claims an amount of Rs.l,66,250/- is due from them.

22. Moreover, the presumption of law which is to be drawn in favour of the complainant, that the cheque has been issued to him for the valid discharge of his debt, further gets refuted in view of the third defence taken by the accused persons. Both accused during framing of notice u/s 251 Cr.P.C and in their statement u/s 313 Cr.P.C have explained how the complainant came into possession of the cheque in question. It is stated by both accused that the cheques in question were given to the complainant as security at the time of starting business of partnership with the complainant. Infact even in their reply to the legal demand notice, accused have stated that the cheques in question were given to the complainant as security at the beginning of transactions between them. DW-2 in his examination-in-chief has also stated that the cheques were given to the complainant, as security, at the time of initiating business with the complainant. Although there is slight inconsistency, as to whether the cheques were given at the time of initial business or beginning of partnership business, however the same does not make much difference, in view of the consistent submission that cheques were given as security. In these circumstances, the onus shifted upon the complainant to show that the cheques in question were issued to him for discharge of his liability and not as security as alleged by the accused persons. Moreover m view of the above discussion, even if the presumptions available under section 118 and 139 of the NI Act are pressed into service in favour of the complainant, the accused is able to rebut the said presumptions by raising doubts in the complainants story.

23. In ***Kali Ram v. State of H.P. (1973) 2 SCC 808*** *Khanna, J. speaking for the three-Judge Bench, held: (SCC p. 819, para 23)*

> *"One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged ....There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the*

prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

24. In light of the above deliberation, it is clear from the evidence of the complainant that he has not placed on record any material to show liability of the accused for the cheques in question. The accused on the other hand, has been able to probabilize their defence through the cross examination of CWl, as well as the evidence led by them. It is well settled that even though the statutory presumption for offence U/s 138 NI Act is in favour of the complainant, still, the prosecution is burdened with standing on its legs. In the instant case, accused persons have been able to rebut the presumption arising in favour of the complainant U/s 139 NI Act. Accordingly accused M/s Add My India Trip and its partners Amit Kumar & Sh. Deepak- Kumar stand acquitted of the offence under section 138 NI Act.

Accused persons are directed to furnish bailbond and surety bond in terms of section 437-A Cr. PC for the next Six month."

From the preceding narration of facts and discussion in the impugned order, what emerges is that the petitioner was never able to show that the dishonour of cheque amounting to Rs.3,50,000/-, was issued against outstanding debt or for the services rendered by it to the respondent. The complaint as well as the petitioner's legal notice under section 138 of the NI Act are silent regarding various payments made into the accounts of the complainant's mother and his brother. It also did not explain, as recorded in the impugned order, why the various payments were made into the said accounts. Admittedly, the complainant did not maintain any books of accounts regarding respondent No. 2 nor did he produce any ledger accounts in this regard. His e-mails were unsupported by the requisite certificate under section 65B of the Evidence Act; no replies of e-mail sent to the accused persons were brought on record to show that the accused persons had admitted the liability as mentioned in the said e-mails. There was no reason why the complainant would transfer an amount of Rs.1,84,000/- to his said debtor, while he contemporaneously claimed Rs. 1,66,250/- as dues from the latter. The impugned order considered the transaction imprudent and the complaint inconclusive and vague. The impugned order did not find that the cheques were issued in the discharge in whole or in part, of any debt or other liability. In the circumstances, it rightly dismissed the complaint.

For the aforesaid reason, the Court does not find any reason to grant leave to appeal. The petition being without merit, is dismissed.

NAJMI WAZIRI, J.

OCTOBER 26, 2017
sb