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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 19.01.2018

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CRL.L.P. 32/2015

BIJENDER SINGH

..... Petitioner

Through: Mr. Abhijat and Mr. Pratyush Sharma,
Advocates.

Versus

RAVINDER SIWACH

..... Respondent

Through: Mr. Jaideep Malik, Adv.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. The petitioner has impugned the order dated 28.11.2014 on the ground that there has been mis-trial inasmuch as the petitioner was never accorded an opportunity to prove his case in accordance with law. He submits that as per the procedure specified under Section 138 of the Negotiable Instruments Act, 1881 (the Act) the accused is to step into the witness box to raise his defence; the defence has to be substantive because the presumption under Section 138 of the Act is against the person who has issued the cheque. The procedure adopted in the impugned order, apropos framing of charge under section 138 of the Act recorded *inter alia*:-

“The notice is read over and explained to the accused in his vernacular and he is questioned as under:

Q1. Have you understood the notice and the cheques in question bear your signatures?

Ans. I have signed the cheques and the name of the payee and the cheque amount have been filled in by me, however, the date was not filled in by me.

Q2. Do you plead guilty or claim trial?

Ans. No. I do not plead guilty and claim trial.

Q3. Have you got any defence to make the above stated accusations?

Ans. Yes.”

2. The learned counsel for the petitioner submits that the moment the accused states that he has a defence, such defence has to be articulated immediately and as a sequiter the accused has to step into the witness box right away. He relies upon the judgment of this Court in ***Rajesh Agarwal Vs State & Anr.*** 171 (2010) DLT 51 which observed as under:

“.... 7. The difference between summary trial and summon trial is thus obvious. In summary trial after the accused is summoned, his plea is to be recorded under section 262 (g) of Cr.P.C. and his examination if any can be done by MM and a finding can be given by the court under section 263(h) of his examination. The same procedure is to be followed by the MMs for offence of dishonour of cheque. If proviso a, b & c to Section 138 N.I. Act are shown to have been complied with, technically the commission of offence stands completed. It is for the accused to show that no offence could have been deemed to be committed by him for some specific reasons & defences. He cannot simply say “I am innocent” or “I plead not guilty”

8. The procedure being followed presently by learned MMs under section 138 of N.I. Act does not commensurate with the summary trial provisions of Cr.P.C. and provisions of Negotiable Instrument Act and that is the reason that decisions of cases under section 138 of N.I. Act is taking

unnecessary long time and the complaints remain pending for years. The procedure as prescribed under law is that along with complaint under section 138 of N.I. Act, the complainant should file affidavit of his evidence and all necessary documents like dishonour memo, returned cheque, notice of demand and then learned MM should scrutinize the complaint & document & if he finds that the affidavit and the documents disclose dishonour of cheque issued by the accused, issuance of a demand notice by the complainant, nonpayment of the cheque amount by the accused despite notice, cheque return memo of the bank etc. and if the court finds that the complaint was filed within the period of limitation, cognizance is to be taken and notice of appearance of accused should be sent to the accused. In case the accused appears before the court of MM, the Court should ask him as to what was his plea of defence. Normally the first date is wasted by the courts of MM just by taking bail bond of the accused and passing a bail order, while section 251 & 263(g) of Cr. P.C. provide that when the accused appears before MM in a summary trial proceedings, the particulars of the offence, to which he is accused, shall be stated to him & he should be asked whether he pleads guilty or he has any defence to make. This is the mandate of section 143 of N.I. Act, which provides summary trial of offence in terms of Cr. P.C. Under Section 263(g) of Cr.P.C., the court has to record the plea of the accused and his examination. It is thus obvious that in a trial of an offence under section 138 N.I. Act the accused cannot simplicitor say "I plead not guilty" and wants to face trial. Since offence under section 138 of N.I. Act is a document based technical offence, deemed to have been committed because of dishonour of cheque issued by the accused or his company or his firm, the accused must disclose to the Court as to what is his defence on the very first hearing when the accused appears before the Court. If the accused does not appear before the Court of MM on summoning and rather approaches High Court, the High Court has to refuse to entertain him and ask him to appear

before the Court of MM as the High Court cannot usurp the powers of MM and entertain a plea of accused why he should not be tried under section 138. This plea as to why he should not be tried under section 138 is to be raised by the accused before the Court of MM under section 251 & under section 263 (g) of Cr. P.C. Along with his plea he can file necessary documents and also make an application, if he is so advised, under Section 145(2) of N.I. Act to recall the complainant to cross-examine him on his plea of defence. However, only after disclosing his plea of defence he can make an application that the case should not be tried summarily but as a summon trial case. This application must disclose the defence of the accused and the reasons why he wants the case to be tried as a summon trial.....

..... 15. In most of the cases, the court of MM may not feel necessary that a sentence of imprisonment of more than one year should be inflicted. Unless the court, for reasons to be given, considers that the punishment in a case should be more than one year, the court cannot deviate from the procedure of summary trial and cannot ask the accused to appear again and again and defeat the very purpose of summary trial. Section 143 and 145 of N.I. Act were enacted by the parliament with the aim of expediting trial in such cases. The provisions of summary trial enable the respondent to lead defence evidence by way of affidavit and documents. Thus an accused who considers that he has a tenable defence and the case against him was not maintainable, he can enter his plea on the very first day of his appearance and file an affidavit in his defence evidence and if he is so advised, he can also file an application for recalling any of the witnesses for cross examination on the defence taken by him.....

..... 17. The summary trial procedure to be followed for offences u/s 138 N.I. Act would thus be as under:

Step I : On the day complaint is presented, if the complaint is accompanied by affidavit of complainant, the concerned MM shall scrutinize the complaint & documents and if

commission of offence is made out, take cognizance & direct issuance of summons of accused, against whom case is made out.

Step II : If the accused appears, the MM shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice u/s 251 Cr. P.C. and enter his plea of defence and fix the case for defence evidence, unless an application is made by an accused under section 145(2) of N.I. Act for recalling a witness for cross examination on plea of defence.

Step III : If there is an application u/s 145(2) of N.I. Act for recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant.

Step IV : To hear arguments of both sides.

Step V : To pass order/judgment....”

3. He further relies upon the judgment of the Supreme Court in **Rangappa vs. Sri Mohan** (2010) 11 SCC 441 which inter alia observed as under:

“.....5. As per the respondent-complainant, the chain of facts unfolded in the following manner. In October 1998, the accused had requested him for a hand loan of Rs. 45,000 in order to meet the construction expenses. In view of their acquaintance, the complainant had paid Rs. 45,000 by way of cash. On receiving this amount, the appellant-accused had initially assured repayment by October 1999 but on the failure to do so, he sought more time till December 2000.

6.The accused had then issued a cheque bearing No. 0886322, post-dated for 8-2-2001 for Rs. 45,000 drawn on Syndicate Bank, Kudremukh Branch. Consequently, on 8-2-2001, the complainant had presented this cheque through

Karnataka Bank, Ranebennur for encashment. However, on 16-2-2001 the said Bank issued a return memo stating that the 'Payment has been stopped by the drawer' and this memo was handed over to the complainant on 21-2-2001.

7. The complainant had then issued notice to the accused in this regard on 26-2-2001. On receiving the same, the accused failed to honour the cheque within the statutorily prescribed period and also did not reply to the notice sent in the manner contemplated under Section 138 of the Act.

8. Following these developments, the complainant had filed a complaint (under Section 200 of the Code of Criminal Procedure) against the accused for the offence punishable under Section 138 of the Act. The appellant-accused had raised the defence that the cheque in question was a blank cheque bearing his signature which had been lost and that it had come into the hands of the complainant who had then tried to misuse it. The accused's case was that there was no legally enforceable debt or liability between the parties since he had not asked for a hand loan as alleged by the complainant.....

..... 10. Furthermore, the trial judge noted that in the complaint it had been submitted that the complainant had paid Rs. 45,000 in cash as a hand loan to the accused, whereas during the cross-examination it appeared that the complainant had spent this amount during the construction of the accused's house from time to time and that the complainant had realised the extent of the liability after auditing the costs on completion of the construction. Apart from these discrepancies on part of the complainant, the trial judge also noted that the accused used to pay the complainant a monthly salary in lieu of his services as a building supervisor apart from periodically handing over money which was used for the construction of the house. In light of these regular payments, the trial judge found it unlikely that the complainant would have spent his own money on the construction work.

11. With regard to these observations, the trial judge held that there was no material to substantiate that the accused had issued the cheque in relation to a legally enforceable debt. It was observed that the accused's failure to reply to the notice sent by the complainant did not attract the presumption under Section 139 of the Act since the complainant had failed to prove that he had given a hand loan to the accused and that the accused had issued a cheque as alleged.....

..... 23. The respondent-claimant has also referred to the decision reported as *Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm & Ors.*, 2008 (8) SCALE 680, wherein it was observed:

"Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. ..."

This decision in *Mallavarapu Kasivisweswara Rao* case then proceeded to cite an extract from the earlier decision in *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal*, (1993) 3 SCC 35 (Para. 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, act upon the plea that it did not exist." (emphasis supplied)

Interestingly, the very same extract has also been approvingly cited in Krishna Janardhan Bhat.....

..... 26. 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 Bhat² 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.

30. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.....”

4. In view of the above cited judgments, the petitioner submits that the presumption in law being in favour of the petitioner i.e. he having received a

cheque in discharge of any debt or other liability, the accused was required to set up a defence, immediately. It was not done. Instead, the petitioner's case was dismissed solely on the ground that he was unable to show that he had adequate funds at the time when the loan was stated to have been given to the respondent/accused. He contends that the presumption in favour of the petitioner is not rebutted by the mere absence of proof of adequacy of funds with the petitioner; therefore, the order has erred in law and needs to be set aside.

5. The learned counsel for the respondent refutes the said arguments on the ground that despite the petitioner having participated in the trial and having been granted due opportunity to prove whether he had the monies or the funds, in the first place, so as to be lend it to the respondent and having failed to establish his financial capacity to lend the alleged loan amount, there cannot be any presumption that the cheque was for the repayment of a loan; logically therefore, it cannot be said to be a case of mis-trial.

6. The petitioner contends that because the procedure adopted by the Trial Court was erroneous, his restrained participation in such flawed process of adjudication cannot estopp him from impugning the procedure and the resultant erroneous order. He insists that the procedure prescribed in ***Rajesh Agarwal*** (supra) is the only procedure that should have been followed by the Trial Court.

7. This Court is unable to see how the procedure adopted by the Trial Court has prejudiced the petitioner's right to a fair trial or to denial of natural justice. His claim was that the cheques were issued to him by the respondent in discharge of a debt, as per the presumption under section 138 of the Act. The Court would note that this presumption, however, is

rebuttable. The respondent contested the claim of a loan. He denied having taken any loan from the petitioner. The defendant could not have done anything more at time of framing of charge, other than to state that he had a defence against the accusations i.e. no loan was taken. He could not, right away, have proven a negative, a void i.e. the non-existence of a loan from the petitioner to him. The petitioner had not produced or relied upon any documentary proof of any loan to the respondent. He had merely alleged a loan and had rested on the presumption in law under section 138 of the Act. Therefore, the logical procedure adopted during the trial was to ascertain whether the petitioner had the financial wherewithal to loan any monies to the respondent or to anyone. The petitioner was not able to prove such financial capacity, despite due opportunity having been accorded to him. The impugned order notes:

“... It is clear that the complainant has failed to produce any source of funds of Rs. 12.50 lacs which is alleged to be given as loan to the accused. In his cross examination, complainant has stated that the money of Rs. 12.50 lacs was kept as cash with him and has not been withdrawn from any bank. CW-1/ complainant stated that he received money as he has sold some land. Complainant has failed to produce any sale papers of the said land. Complainant also stated that he do not remember whether he has shown the said amount in his ITR or not. Cross examination of complainant was deferred to give an opportunity to complainant/ CW-1 to bring ITR but the complainant has failed to produce ITR in the Court. The failure to produce ITR despite opportunity, only attracts an adverse inference that the transaction is not accounted in ITR. It is very strange that complainant in his cross examination has stated that he do not remember whether amount lent to the accused is shown in the ITR or not. Complainant has failed to show any source of funds from which he has made such a huge the payment to the accused. Any payment above Rs.

20,000/- should have been through banking mode as per Income Tax Act. All these circumstances create doubt as to authenticity of transaction and eclipse legality alleged debt.....”

8. In view of the above, the presumption under section 138 of the Act is rebutted. ***Bharat Barrel & Drum*** (supra) quoted in ***Rangappa*** (supra) has held that if the defendant has shown that the existence of consideration was improbable or doubtful the onus would then shift to the plaintiff to prove it as a matter of fact. In the present case the defendant was able to show that the petitioner never had the wherewithal to loan any monies. Therefore, the presumption in law was rebutted by him. The petitioner has not been denied any opportunity to prove his case. The procedure adopted cannot be termed as a mis-trial. There is no reason to interfere with the impugned order. The petition is without merit and is, therefore, dismissed.

JANUARY 19, 2018

NAJMI WAZIRI, J