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

\+ CRL.REV.P. 557/2018, CRL. M. (BAIL) 1047/2018

VIJAY KUMAR ..... Petitioner

Through: Mr. O.N. Rattanpala and Mr. Man Mohan Singh, Advocates.

versus

STATE & ANR ..... Respondents

Through: Mr. G.M. Farooqui, APP for State.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

O R D E R

% **17.07.2018**

This petition impugns a judgment dated 02.05.2018 whereby the petitioner was convicted under section 138 of the Negotiable Instruments Act, 1881 and had been sentenced for 18 months alongwith a fine of Rs. 6.30 lacs.

The learned counsel for the petitioner submits that cheques were never issued against the discharge of a debt or other liability. He states that the cheques were forcibly taken from him by the respondent and then sought to be encashed. He submits that since there was no liability in the first place, the cheques were not encashable; therefore they were rightly dishonoured. The Court finds the said argument untenable because no such plea was taken before the Trial Court that the cheques were taken forcibly from the petitioner. If that was so, the petitioner could well have filed a police complaint against the forcible deprivation of his cheques;

simultaneously he could have informed the banker not to honour the cheques. This contention has been adequately dealt with in the impugned order in para 17.

Other contentions of the petitioner were considered as under:-

"14. Arguing on behalf of appellant, counsel Sh. Rishi Pal Singh, contended that to make out a case u/sl38 NI Act, there must be pre existing legal enforceable liability. In the present case, there did not exist legal enforceable debt or liability for the discharge of which the cheques in question could have been issued. The provision of Section 138 NI Act is therefore not applicable. The trial court has failed to appreciate the legal position that the case of complainant is based on illegal agreement which is void ab initio, and therefore cannot be honoured by the court of law. The accused has not been liable to pay any amount to the complainant as no lawful or contract has been existing between them. Ld. Counsel referred to judgment in case titled Virender Singh Vs. Laymi Narain & Anr.. I (2007) BC 530, 2007 CriLJ 2262, in support of his arguments.

15. On behalf of respondent / complainant, Counsel Mohd. Arif, argued that cheques in question have been issued in discharge of legally enforceable debt and liability The complainant has been able to prove the facts through oral as well as documentary evidence and also in view of presumption available u/s 139 Negotiable Instruments Act, the claim of complainant has rightly been decided by the trial court. Ld. Counsel referred to judgment in case titled I.C.D.S Ltd. Vs. Beemna Shabeer. A.I.R 2002 Supreme Court 3014, in support of his arguments.

16, It is the case of the complainant that accused Kumar issued cheques in question acknowledging his liability in writing vide Ex.CW1/B. The accused on the other hand, although admitted issuance of cheques claimed that he issued blank cheques as complainant promised to get him a loan which was not given and the cheques have been misused. On examining the testimony of the complainant Nawab Ahmed

(CW1) and the documents proved therein, I find that complainant has been able to substantiate his averments through proper, legal and sufficient evidence on record. The accused has failed to impeach the testimony of complainant despite having cross examined him. The acknowledgment Ex.CW1/B has not been disputed as there is no suggestion to the complainant that same was not executed by the accused.

17. Accused has been taking inconsistent pleas in his defence as he admitted having filled up the cheques in question but then also retracted and stated that cheques are not in his handwriting. The plea of accused that he had handed over blank cheques to the complainant for securing the loan is further not believable as no steps were taken by the accused to inform his bank to stop the payment or to issue legal notice to the complainant seeking return of the cheques. The accused has not even replied the legal notice of the complainant. It is clear that pleas taken by accused are only an afterthought.

18. Under section 139 of Negotiable Instruments Act, there is a legal presumption that the cheques were issued for discharging an antecedent liability The aforesaid presumption is in favour of the holder of cheques. It is open to the accused to adduce evidence to rebut the said presumption but in the present case accused has failed to displace the presumption and the evidence produced by him and the pleas taken by him are not rational and logical.

19. Therefore, so far as the merits of the case are concerned, complainant has been able to prove his averments whereas accused has not been able to – m any strong defence to show his innocence.

20. Coming to the issue raised on behalf of appellant that the basis of issuance of cheque has been illegal agreement which cannot be enforced, I have carefully examined the written acknowledgment Ex.CW1/B. There is clear statement on behalf of accused Vijay Kumar that he is liable to pay Rs.4,50,000/- to complainant Nawab Ahmed and therefore he is issuing cheques to settle the claims. It is nowhere written in the agreement that complainant has agreed to avoid police action or that complainant has promised not to take police *action against the accused for the offences of cheating and fraud. It is no doubt true that complainant in his pleadings has mentioned that accused and Dharmendra Saxena when confronted with their guilt of having committed offences of cheating and fraud, tendered unconditional apology and offered settlement but nowhere in the written agreement (Ex.CW1/B) the factum of apology or commitment by the complainant not to proceed against the accused, is noted. In the circumstances, the agreement/acknowledgment Ex. CW1/B cannot be termed as illegal contract for agreement. It is still open to the complainant to file police complaint against the accused for the criminal activities carried out by him.*

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23. Examining the findings of magistrate as contained in the impugned judgment, I hold that there is no infirmity in the judgment and no interference is called for. The impugned judgment is accordingly upheld and findings of conviction are approved against the accused.

24. I have also considered the order passed by Ld. Magistrate on the issue of sentence. In my opinion, the quantum of sentence is reasonable and logical. I find no reason to interfere with the order of sentence also. Accordingly, same is upheld".

The petitioner also argues that the cheques were issued as a security against a loan promised by the respondent; which was given to him by the respondent but the loan was never given to the petitioner, therefore, there was no liability in the first instance to repay any monies to the respondents. This plea is too untenable because the appellant/accused had acknowledged in writing, his liability to pay the respondent by Ex. CW1/B. Furthermore, the testimony of Nawaj Ahmad (CW I) in support of the complaint, remain unimpeached.

The Court finds no reason to interfere with the impugned order which was upheld the dismissal of the complaint. Accordingly, the petition is dismissed.

NAJMI WAZIRI, J

JULY 17, 2018

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