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

% *Judgment delivered on: 16.05.2018*

+ **CRL.L.P. Nos. 495-499 & 501-502/2015**

VISHNU AGGARWAL Petitioner

Through: Mr. Surendra M. Mittal, Advocate.

Versus

M/S JEEVAN RAM MANOJ KUMAR Respondent

Through: Mr. Ashok Chhaparia, Advocate.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. The petitioner has impugned an order dated 15.04.2015 whereby the Ld. Metropolitan Magistrate has dismissed his complaint under section 138 of the Negotiable Instruments Act, 1881 (in short 'the Act').

2. It is the appellant's case that the respondent owed him an amount of Rs. 60 lacs for which 17 post-dated cheques were issued; 16 cheques of Rs. 2.5 lacs each and one cheque for Rs. 3 lacs. These cheques were encashable every successive month. The petitioner's complaint under sections 138 and 142 of the Act stated that the said amount was taken by M/s Jeevan Ram Manoj Kumar and Smt. Brij Bala in her capacity as its proprietor, therefore, she had issued the said cheques as security and promise for return of the monies. The petitioner had alleged that the entire amount was taken from the complainant in cash as a loan on interest by the accused persons, i.e. the

proprietorship firm through its proprietor Smt. Brij Bala. The principal amount was to be repaid alongwith the interest accrued thereon, but no repayment was made. Later, a settlement was entered into with the accused persons, and the aforesaid cheques were issued as a result of the understanding in the settlement. Upon presentation, all the cheques were dishonoured. However, the cheque of Rs. 3 lacs was never presented, since an equivalent amount had been received in cash from the accused persons. A legal notice was issued on 20.01.2006. It was not responded to. Therefore, a clear presumption arose that the cheques were issued against the debt or some other liability. The said presumption has not been rebutted under section 139 of the Act.

3. The learned counsel for the petitioner also submits that initially an amount of Rs. 10 lacs was invested by the appellant in the year 1992 @ 18% p.a. The suit was filed in the year 2007 by which time along with compound interest, the repayable amount rose to Rs. 60 lacs. However, on the basis of the compromise entered into between the accused persons, the outstanding dues was reduced to Rs. 43 lacs. The total of the amounts mentioned in the 17 cheques issued by the respondent is testimony of the fact that the settlement was for repayment of Rs. 43 lacs.

4. In support of his contentions, he relied upon the judgment of **K.N. Beena vs. Muniyappan & anr.** AIR 2001 SC 2895, which held *inter alia*:-

“7. In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellant/Complainant to prove that the cheque was issued for

a debt or liability. This is an entirely erroneous approach. The 1st Respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st Respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st Respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction”.

(emphasis supplied)

5. The learned counsel submits that in the present case, the respondent Smt. Brij Bala, was the issuer of the cheques was not even summoned for cross-examination. Therefore, the presumption of liability under section 138 was discharged and the impugned order has erred on a fundamental issue. He also relies upon the judgment of this Court in **Suresh Chandra Goyal vs. Amit Singhal** III (2015) BC 659 (Del.) which held that section 138 of the Act does not distinguish between a cheque issued by a debtor in discharge of an existing debt or other liability and a cheque issued as a security, on the premise that on a due future date a debt would be crystallised and thus would become payable.

6. He submits that in the present case, a Power of Attorney was issued by the petitioner to the husband of Smt. Brij Bala for the alleged recovery of an amount of Rs. 4 lacs, which was advanced in the name of one Mr. Hanuman. The Compromise Deed reads as under:

“COMPROMISE DEED

This Deed of compromise is made and executed at Delhi on this 21st day of May, 2005, between (1) Shri Jagdish Prashad Gupta son of late Shri Jeevan Ram Gupta (2) Shri

Manoj Gupta son of Shri Jagdish Prashad Gupta, resident of Flat No. 464, Pocket : C-8, Sector:8 , Rohini, Delhi:110085 (hereinafter called the first party)AND Shri Vishnu Aggrawal son of late Shri Giri Lal Aggrawal, resident of 43/77, Punjabi Bagh, West Delhi, (hereinafter called the second party.)

They the first party was taken a cash loan from the second party and the first party fails to repay the said loan amount in time, and now both the parties have settled the said loan amount, and first party is ready to make the payment against the said loan amount to the second party, which is accepted by the second party and for payment of the same, the first party has issued seventeen cheques drawn on Central Bank, More Gate Branch, Delhi in favour of the second party for the period started from May, 2005 to 10.11.2006 respectively and the said cheques duly signed and filled up by the Prop. of firm M/s Jeevan Ram Manoj Kumar which the one firm of the first party.

And whereas, the first party ensured the second party that the said cheques are fit for encashment and shall be fully encashed as and when the second party presented the same in the Bank, in case the said cheque will not encash/dishonour, then the second party shall have the right to recover the same amount through court of law and to initiate all the proceedings under the law against the first party and the first party has agreed for the same.

And whereas, the parties to this Agreement have read over the contents of this Compromise Deed/Agreement, and have understood the contents of the same, and also agreed to bound by the terms and conditions of this deed and their legal heirs also bound by this deed”

7. Interestingly, a declaration also had been issued by the appellant declaring as under:-

“DECLARATION

I, VISHNU BHAGWAN AGGARWAL S/O LATE SHRI GIRI LAL AGGARWAL, R/O 43/77, PUNJABI BAGH WEST, DELHI, do hereby declare that I am also known by the name of Hanuman Prasad and I have given cash loans to various parties in the name of Shri Hanuman Prasad against receipts and has to recover the same from those parties. I am unable to recover the cash loans from various parties. I have therefore, given all my right, title and interest in all the cash loans/receipts in favour of SHRI JAGDISH PRASAD GUPTA, S/O SHRI JEEVAN RAM GUPTA AND SHRI MANOJ GUPTA S/O SHRI JAGDISH PRASAD GUPTA, BOTH RESIDENTS OF FLAT NO.464, POCKET-C-8, SECTOR-8, ROHINI, DELHI-85 jointly as well as severally and have received post dated cheques against the same. Now I am left with no claim against Shri Jagdish Prasad Gupta and Shri Manoj Gupta or any member of their family. I further declare that all the receipts executed by any person in favour of Shri Hanuman Prasad are against cash loans received by them from me. Shri Jagdish Prasad Gupta and Shri Manoj Gupta are entitled to recover the cash loans from any/all of the parties and to take any step as they deem fit and proper for recovery thereof”.

8. Neither the Compromise Deed nor the Power of Attorney nor the Declaration mention any amount which would be re-payable to the petitioner by the accused persons, i.e., Smt. Brij Bala. Furthermore, the Compromise Deed has not been signed by Smt. Brij Bala - the issuer of the cheques. The 17 cheques are premised on the Compromise Deed to which the accused person Smt. Brij Bala is not privy. During the trial, the defense taken by the accused persons was that no such monies had ever been taken by them, as a loan and on the terms alleged by the petitioner. Other than

denying the factum of loan, the accused person could not have led any evidence at that stage; because according to her, there was no transaction of money between her and the petitioner/complainant. She could not prove a negative. It is commonsense that a void or nothingness cannot be proven. The duty of proof was then cast upon the complainant, to establish in the first instance that he had the requisite monies starting from the year 1993, to have loaned it to the accused persons. An opportunity was given to the appellant to show his Income Tax Returns, Ledger Books and bank accounts details, that he had sufficient means to have invested or lent the money to the said persons. Interestingly, in his cross-examination on 21.01.2008, he had stated:

“ I do not have any document also by considering or consulting which, I would be able to tell if I had rupees ten lacs cash in any of the years from 2000 to 2008 till date. I had not given rupees sixty lacs to accused in one time.....”

9. Although, the petitioner/complainant had deposed that he had borrowed some monies from his relatives, i.e., his brother, his son-in-law and his brother-in-law, this statement was not supported by the names of the relatives, the specific amounts borrowed from them and on what terms, the date of such borrowings, the corresponding Ledger Book entries and the corresponding bank account transactions or details. He had deposed in his examination-in-chief that he had paid Rs.60 lacs to the accused persons, yet, in his cross-examination (at page 179 of the paper-book) he admits that *“it is correct that I do not have any document to show that I have given Rs.60 lacs to Smt. Brij Bala.”*

10. It is this lack of evidence which was taken into consideration in the impugned order, to logically conclude that there was nothing on record to show that the petitioner had either borrowed monies from his relatives or had given any loan to the accused.

11. From the preceding discussion what is evident is that the Settlement Deed or compromise relied upon by the petitioner was not signed by Smt. Brij Bala for herself or on behalf of her proprietorship firm; furthermore, it does not specify any amount as payable by her. Logically, therefore, there would be nothing to secure as dues and the issuance of the 17 cheques would themselves not be admission of an outstanding debt. The presumption under section 138 is rebutted under section 139. The appellant has been unable to prove that he had invested Rs.10 lacs or Rs.60 lacs with the accused persons or that by the Compromise Deed dated 21.05.2005, Smt. Brij Bala had acknowledged repayment of the said monies. The said Compromise Deed is of no evidentiary value.

12. The Court would note that the impugned order had dealt with this issue extensively as under:

“11.1 It is also observed that the complainant has also admitted that his firm, M/s Economic Enterprises was closed in the year 2000-2001 and he cannot disclosed his source of income apart from his business from M/s Economic Enterprises. Complainant also admitted that he used to get sign on book or got signed hundi and promissory notes to whom he used to lend money but he himself has never got executed any promissory note or hundi. CW1 admitted his signatures on Ex.PW1/D5, EX.PW1/D6, EX.PW1/D7, Ex.PW1/D8. Ex.PW1/D9, Ex.PW1/D10, Ex.PW1/D11, EX.PW1/D12, Ex.PW1/D14, Ex.PW1/D15, EX.PW1/D18, EX.PW1/D19 and Ex.PW1/D20. It is also observed that CW1 shown his unawareness qua advancing of loan to various firms

and agencies and to some he has denied. CWI showed his non-remembrance of loan transaction for M/s Shivan Agencies, M/s K.D. Kishan Lai, M/s Snehlata Trading Company, M/s Shyam Babu and Sons, Laxmi Saree Emporium, Rina Silk Emporium, Shri Sameer Jain and Sh. Sanjay Jain, M/s Krishna Synthetics, Tiger Wire Nit, Nirmal Metal and Plastics, Vijay Kumar Anil Kumar, Sh. K.K. Rastogi etc. whereas, he has denied his transaction with Sh. Anil Bhargwa, Rishav Jain and Bikaner Bhujia Bhandar but the DWI deposed regarding the documents by which Vishnu Aggarwal also lend the money to number of persons vide documents Ex.PW1/D-36, Ex.PW1/D-42, Ex.PW1/D-43, EX.PW1/D-44, EX.PW1/D-45, Ex.PW1/D-46, Ex.PWI/D-48, Ex.PWI/D-49, Ex.PWI/D-50 and Ex.PW1/D-51 by his name as Vishnu Aggarwal and in absence of any rebuttal or cross examination to that point the testimony of DWI has remained untainted and un rebutted”.

13. In view of the aforesaid, the Court is of the opinion that no grounds are made out for interfering with the impugned order.

14. The petition is without merit and is accordingly dismissed.

NAJMI WAZIRI, J.

MAY 16, 2018/RW