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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 13.09.2019

+ **CRL.REV.P. 964/2019 with CRL.M.(BAIL) 1610/2019,**
CRL.M.A. 35694/2019

AJAY MARWAH Petitioner
Through: Mr. K. Kaushik, Adv.

versus

STATE & ANR Respondents
Through: Mr.Hirein Sharma, APP for State
None for R-2

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition, the petitioner/ accused prays for setting aside the impugned judgment and order dated 04.09.2019 passed by the learned ASJ (North-West), Rohini Courts, Delhi, in C.A. No. 56/19, titled as '*Ajay Marwah Versus B.D. Jain Trading Company*' and further prays for setting aside the judgment dated 28.02.2019 and order on sentence dated 06.03.2019 passed in Complaint Case No. 15367/2016 titled as '*M/S B.D. Jain Trading Company Versus Ajay Marwah*' by the learned Metropolitan Magistrate, Rohini Courts, Delhi.

2. The present petition is filed on the ground that the trial Court and the Appellate Court failed to take into consideration the fact that the petitioner herein was summoned on the basis of affidavit dated 07.09.2013 (Ex.CW1/1) filed by the respondent No. 2. As per the affidavit, there is no ingredient / substance / material by which prima facie makes out a case under Section 138 of Negotiable Instruments Act. Not only this, not even a single document which claimed to have been exhibited during trial is signed by any Judge. Moreover, in the affidavit, which is the basis of summoning, the petitioner as an accused under Section 138 of Negotiable Instruments Act, it is nowhere mentioned that whether any legally recoverable debt towards the petitioner or any demand was ever made or the cheque in question was ever handed over to respondent No. 2. Thus, both the Courts have failed to take into consideration the fact that the respondent No. 2 neither filed a detailed affidavit, which makes out a prima facie case under Section 138 of Negotiable Instruments Act for summoning the petitioner as an accused, nor has he examined himself as complainant.

3. Ld. counsel further submitted that the respondent No. 2 was not examined as witness and has not even exhibited the complaint. Thus, while concluding the arguments, learned counsel for petitioner submits that since

there is no recoverable debt against the petitioner, even summoning order was perverse and both the Courts below have failed to consider the said fact, accordingly, the petition is deserves to be allowed.

4. The case of the respondent No. 2/ complainant made in the complaint is that respondent No. 2 is a proprietary company, engaged in business of cloth and readymade garments and Shri Satish Chand Jain is its sole proprietor. The petitioner/ accused purchased 2000 meters of cloth for a sum of ₹2,40,000/- vide bill no. 1185 dated 05.03.2013 and 2091 meters of cloth for a sum of ₹2,61,375/- vide bill no.1190 dated 12.03.2013 and in consideration of supply of clothes, the petitioner issued a cheque bearing no.356166 dated 28.06.2013 for a sum of ₹5,00,000/- (Rupee Five Lacs only) drawn on HDFC Bank, Punjabi Bagh, New Delhi to the respondent No. 2/ complainant in discharge of its liability. The balance amount of ₹1375/- was treated as a discount. The said cheque was dishonoured with remarks '*funds insufficient*' vide cheque Return Memo dated 01.07.2013. Thereafter, the respondent No. 2/ complainant issued a legal notice dated 29.07.2013 to the petitioner through his counsel. Despite service of the legal notice, the petitioner neither gave reply nor paid the cheque amount within the stipulated period. Thereafter, the complainant presented the complaint

before the trial Court and the petitioner was tried and convicted by the trial court, which has been upheld by the learned appellate court vide order dated 04.07.2019.

5. I note, Learned trial Court in Para 3 of the impugned order has recorded that *“in his pre-summoning evidence, complainant examined himself on affidavit Ex. CW-1/1. He reiterated the contents of complaint and placed on record, copy of bill dated 05.03.2013 as Ex.CW-1/A(OSR), copy of bill dated 12.03,2013 as Ex. CW-1/B(OSR), cheque bearing no. 356166 dated 28.04.2013 for a sum of Rs,5,00,000/- drawn on HDFC Bank, Punjabi Bagh, New Delhi- 110026 as Ex.CW1/C, cheque returning memo dated 01.07.2013 as Ex. CW-1/D, legal notice dated 26.07,2013 as Ex. CW-1/E, postal receipt as Ex. CW-1/F and tracking report as Ex. CW-1/G.”*

6. It is pertinent to mention here that the petitioner took the defence before both the Courts below that he had business transaction with the complainant 6-7 years ago but he had not issued the cheque in question in favour of the complainant. He alleged that 2-3 years back, he had misplaced his few cheques including the cheques in question and consequently, he had lodged a police complaint in this regard. However, he has admitted his signatures on the cheque in question but denied having filled the contents

therein. He also denied receiving any legal notice.

7. The petitioner was examined on 12.02.2018 under Section 281 Cr.P.C. read with Section 313 Cr.P.C. in which all the incriminating evidence were put to him, to which, he took the same defence as was taken by him at the time of framing of notice under Section 251 Cr.P.C. He stated that that he had never purchased any cloth from the complainant and bills Ex. CW-1/A & Ex.CW-1/B are false documents. He preferred to lead defence evidence but he did not examine any witness to this effect.

8. Be that as it may, the petitioner has admitted the business transaction with the respondent No. 2 but he also alleged that he had not issued the cheques in question in favour of the respondent No. 2/ complainant.

9. He further stated that certain cheques, including the cheque in question, were misplaced by him and he had lodged police complaint in Police Station – Mukherjee Nagar.

10. However, no cogent evidence has been led by the petitioner in support of the said claim. The reason for dishonour of cheque is insufficiency of funds. No explanation was given by the petitioner as to why he did give ‘stop payment instructions’ regarding the cheques in question, if, cheques were misplaced. Further, the petitioner did not step into the witness box to

stand by his defence. The defence taken by the petitioner at the time of framing of notice and while recording the statement of petitioner under Section 281 Cr.P.C. read with Section 313 Cr.P.C. cannot be considered as evidence.

11. In case of ***V.S. Yadav vs. Reena, 172 (2010) DLT 561*** and ***Bansal Plywood vs. State (NCT of Delhi) and Anr. (Criminal Appeal No. 17 of 2017 decided on 04.09.2017)***, it is held that “*the defence taken by the respondent No. 3 at the time of framing of notice under Section 251 Cr.P.C. or the defence taken by her in her application under Section 145 (2) NI Act or her explanation under Section 313 Cr.P.C. read with Section 281 Cr.P.C. of the Code recorded on 04.02.2015 is not ‘evidence’ within the meaning of Section 3 of the Indian Evidence Act, 1872. When a person appears in the Court as a witness, he is required to state facts on oath under Section 4 of the Oaths Act, 1969 and his examination in chief is tested on touchstone on cross-examination by other party. This is actually the evidence. Therefore, the plea taken in application under Section 145(2) NI Act or defence taken at the time of framing of notice under Section 251 of the Code or the explanation under Section 313 read with Section 281 of the Code by any stretch and imagination cannot be treated as ‘evidence’.*”

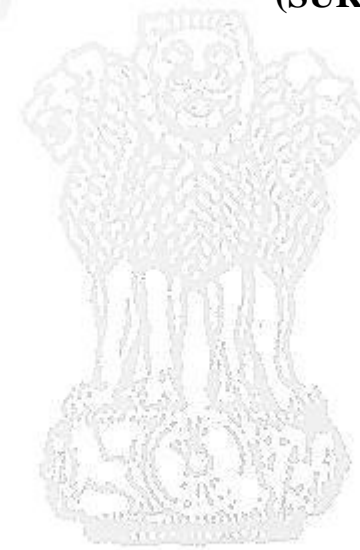
12. In view of the above facts and settled legal position, I find no merit in the present petition.

13. The same is accordingly dismissed with no orders as to costs. Pending applications also stand disposed of.

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 13, 2019

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