

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

CRL.REV.P. 364/2018

Judgment Reserved : 13.09.2019

Date of Decision : 20.09.2019

IN THE MATTER OF

ANUP KUMAR SINHA

..... Petitioner

Through: Mr. Vishal Sinha, Adv.

versus

STATE & ANR.

..... Respondents

Through: Dr. M.P. Singh, APP for State.

Mr. Varun Chawla and Mr. Atithya
Saxena, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. By way of present revision petition, the petitioner has challenged the impugned judgment dated 22.01.2018 passed by the Additional Sessions Judge-03 (South), Saket Courts, New Delhi in Criminal Appeal No. 8176/16 arising out of C.C. No. 931/6/2014, whereby the petitioner's conviction was upheld.

2. The Trial Court, vide judgment dated 27.08.2015, convicted the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and vide order on sentence dated 10.09.2015 directed the petitioner to pay compensation of Rs.6 lacs to the complainant within three months and in default thereof to undergo simple imprisonment for six months.

3. The brief facts, as noted by the Appellate Court, are as under :-

“3. The brief facts of the case as emanating from the trial court record are that the complainant was interested to purchase a property in Goa. In the year 2007, complainant

met the accused in Delhi, accused introduced himself as a property consultant in Goa. On 17.02.2008, during a visit to Goa, complainant contacted accused for purchase of a property in Goa. Thereafter, complainant was shown certain properties at Neruel Badez, District Goa and he became ready to purchase one property and accordingly, he asked accused to organise a meeting with the owner Mrs. Milananeze Gomes. After few days, accused informed complainant that Mr. Mario F. Pachaco, the advocate of said owner had asked to deposit Rs.15 lacs as earnest money for organizing meeting with the owner as he stated that owner is an old man and he would come to Mumbai only if the complainant showed his intentions to buy by paying Rs.15 lacs. The complainant however denied to pay said amount of earnest money without the execution of agreement to sell. After some time, complainant was again approached by the accused and asked to send Rs.3 lacs in the account of the accused for proceeding further with the negotiations with Mr. Pachaco and for organizing the meeting with the owner of the property. Accordingly, complainant deposited a cheque of Rs.3 lacs which got honoured and the money got transferred in the account of accused on 29.02.2008.

4. But later on, complainant came to know that the owner of the property had never demanded any earnest money for organizing any meeting with the complainant. Thereafter, complainant demanded his money back from the accused and accused assured him to deposit the money in complainant's bank account within two days. However, when accused failed to pay back said amount, complainant filed a police complaint against accused with Goa police pursuant to which, accused gave a cheque no. 070202 dated 30.04.2008 (the date was subsequently changed to 10.06.2008 by the accused under his initials) drawn on State Bank of Patiala for refund of aforementioned amount of Rs.3 lacs but the same got dishonoured on 14.06.2008 on account of 'insufficiency of funds'. On 19.06.2008 complainant received the returning memo from his banker. Thereafter, complainant sent a legal notice of demand dated 01.07.2008 to the accused by registered A.D. and speed post at Delhi address as well as at Goa address of accused. Accused however, failed to make the payment even after expiry of

notice period and same led to filing of aforementioned complaint before Ld. Trial Court where, complainant led pre-summoning evidence, on the basis of which Ld. Trial Court summoned the accused u/s 204 Cr.P.C. vide order dated 04.08.2008. Vide order dated 18.08.2009, Ld. Trial Court served upon the accused a notice u/s 251 Cr.P.C. to which he pleaded not guilty and claimed trial.”

4. During the trial, the petitioner’s stand that he did not receive any legal notice, was disbelieved as the said stand was taken for the first time during the recording of the petitioner’s statement under Section 313 CrPC and no suggestion to the above effect was given to the complainant or his wife during their evidence. The petitioner did not mention as to under what circumstances he had issued the impugned cheque to the complainant.

5. In his statement recorded under Section 313 CrPC, he stated that although he had returned Rs.3 lakhs in cash but the said cheque was issued only for the purpose of reflecting return/entry back in his account and the cheque was not made for the purpose of presentation. He further stated that the complainant wanted him to give Rs.3 lakhs to one Prabhakar. However, in his evidence, the petitioner has examined himself as DW1 where his stand was completely contrary. He deposed that the complainant came himself and asked for Rs.2.60 lakhs. The petitioner withdrew the said amount and gave it to the complainant. When the petitioner asked the complainant for a receipt, the complainant, being intoxicated, was not in a position to write and the said receipt was given by Mr. Prabhakar @ Sagar. Further, the petitioner produced a copy of the said receipt during his deposition and as the receipt was only a photocopy it was marked as ‘Mark D’. It is relevant to mention that the said receipt was not put to the complainant or his wife during their cross-examination. Even otherwise, a perusal of the said receipt shows that it acknowledged the issuance of the

impugned cheque.

6. It is the petitioner's case that the remaining Rs.40,000/- was paid in cash by him to the complainant in June 2010. The said stand of the petitioner is unbelievable as prior to that, the complainant had already issued a legal notice under Section 138 NI Act on 01.07.2008 and filed the complaint before the concerned court. The petitioner appeared before the trial court on 16.07.2009 and was granted the bail vide order dated 21.07.2009. On 18.08.2009, the notice under Section 251 CrPC was also framed.

7. The petitioner also took a stand that on 16.03.2011, the complainant had asked his friend Prabhakar to collect the photocopy of the receipt from the petitioner. The said Prabhakar kidnapped the petitioner and snatched all the documents and cash of Rs.1.90 lakhs from the petitioner. The petitioner filed an FIR in P.S. Panajim. The copy of the FIR was marked as "Mark D2". A bare look at the said FIR would indicate that the same was registered with the following particulars:-

"On the DTPO mentioned above, above noted accused criminally trespassed into flat of the complainant, wrongfully confined him in the flat, assaulted him with slaps and fist blows causing him injury and snatched away the keys of his flat and car No.RJ-2-4715 and thereafter abducted him in his car from the place of stay."

There is no mention of any receipt being snatched. As such, even above stand of the petitioner was falsified.

8. The petitioner had moved an application under Section 311 CrPC for recall of the complainant to cross-examine him with respect to above mentioned receipt, however, the said application was dismissed vide order dated 27.08.2014. The said order was never challenged by the petitioner and it attained finality. The appellate court noted that the petitioner had

taken different defence pleas at various stages of the trial and thus failed to prove any probable defence.

9. It is also seen that the petitioner had changed the date of issuance of cheque from 30.04.2008 to 10.06.2008 under his signatures whereas as per his version given while appearing as DW1 it was stated that Rs. 2,60,000/- was paid in cash in the month of April and Rs.40,000/- was paid in the month of June. If the above statement of the petitioner is to be believed there was no need to handover the cheque of Rs.3 lakhs to the complainant. No explanation worth its name has been provided by the petitioner on the above aspect.

10. In Hiten P Dalal vs. Bratindranath Banerjee reported as (2001) 6 SCC 16, Supreme Court has held as under :-

22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A. Vaidyanatha Iyer AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form

the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Section 3: Evidence Act. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.

24. Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantraai Balwantraai Desai vs State of Maharashtra AIR 1964 SC 575, where this Court reiterated the principle enunciated in State of Madras vs Vaidyanath Iyer (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption if drawn may be rebutted by an explanation which "might reasonable by true and which is consistent with the innocence" of the accused. On the other hand, in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the

explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted''

11. Both the courts have recorded concurrent findings that the complainant has been able to prove that on the date of issuance of the cheque, there was legally enforceable debt and the petitioner has failed to rebut the legal presumption as no probable defence was raised to discharge the onus of proof by showing non-existence of consideration. Rather, the defence put forward by the petitioner was found to be false. It was thus held that the petitioner had failed to discharge the onus and the presumption under Section 118A and 139 of NI Act remained unrebutted.
12. In view of the above discussion, I do not find any illegality or infirmity in the impugned order passed by the appellate court. Resultantly, the revision petition filed by the petitioner is dismissed.
13. Trial Court Record be returned along with a copy of this judgment.

MANOJ KUMAR OHRI, J

SEPTEMBER 20th, 2019

ga/na