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

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Reserved on: 05.09.2023
Pronounced on: 13.09.2023

+ **CRL.M.C. 2239/2019 & CRL.M.A. 8946/2019**

AMMAR AHMAD KHAN

..... Petitioner

Through: Mr. Chirag Jamwal, Mr. Ajay
Upadhyay, Advocates

versus

STATE OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Satish Kumar, APP for the
State.
Mr. Kunal Anand, Mr. Amresh
Bind, Ms. Shisham Pradhan,
Advocates for R-2

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The petitioner, by way of present petition filed under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C. '), impugns the order dated 20.09.2018 passed by learned Special Judge (PC Act), CBI-1, Saket Courts, New Delhi ('Revisional Court') in Criminal Revision No. 383/2018 *vide* which the summoning order dated 13.04.2018 passed by learned Metropolitan Magistrate-01, NI Act, South District, Saket Courts, New Delhi ('Trial Court') in CC No. 4617/2018 was upheld.



2. Brief facts of the case are that a complaint was filed under Section 138 of Negotiable Instruments Act, 1881 (*'NI Act'*) by respondent no. 2/complainant alleging that the petitioner had been known to the complainant for last three years and had approached him in the month of July, 2017 intending to purchase a property where he was already residing at New Friends Colony, New Delhi. The complainant had arranged Rs. 50 lakhs as sought by the petitioner and had advanced Rs. 50 lakhs on 07.09.2017 to the petitioner on the assurance that money will be returned immediately when his house loan is sanctioned and even if the house loan was not sanctioned, he had undertaken to return the same by October, 2017. As per complainant, he had started requesting the petitioner to return the money in October, 2017 which he had given for purchasing house but to the surprise and shock of the complainant, he had got to know that the property which the petitioner had represented to purchase was not for sale in the market and he had no plan to purchase the same or any other property. It was alleged that petitioner had misrepresented dishonestly with malafide intention to the complainant that he needed money to purchase the property so that he could obtained huge amount of Rs. 50 lakhs from the complainant. The complainant had also filed a complaint case under Section 156(3) of Cr.P.C. for registration of FIR against the petitioner. It was further alleged by complainant that on 12.01.2018, the petitioner had handed over a post-dated cheque i.e. cheque bearing no. 000129, dated 31.01.2018, drawn on HDFC Bank, New Friends Colony to the complainant and he had also assured him that the cheque issued would be honoured on presentation. However, when the cheque was presented



on 23.02.2018, the same had returned unpaid by the bank with the remarks 'Insufficient Funds'. Thereafter, the complainant had sent a legal notice dated 10.03.2018 to the petitioner requesting him to make payment within 15 days of receipt of the notice, however, no reply or payment was received. Thereafter, on 10.04.2018, the complainant had filed the present complaint against the petitioner under Section 138 of NI Act.

3. The learned Trial Court *vide* order dated 13.04.2018 had issued summons to the petitioner. The order of summoning was challenged by the petitioner, however, the learned Revisional Court was pleased to dismiss the revision petition filed by the petitioner *vide* order dated 20.09.2018. Aggrieved by these orders, the petitioner has preferred the present petition before this Court.

4. Learned counsel for the petitioner argues that the summoning order passed by the learned Trial Court is cryptic and against law, and the learned Revisional Court has failed to appreciate that the Trial Court while passing the impugned summoning order has not followed the law laid down by the Hon'ble Apex Court in ***Krishna Janardhan Bhat v. Dattatraya G. Hegde*** (2008) 4 SCC 54. It is argued that existence of 'legally recovery debt' is not a matter of presumption under Section 139 of the Act; rather, Section 139 merely raises a presumption in favour of a holder of the cheque that same has been issued for discharge of any debt or other liability. It is stated that the presumption has to be in regard to existence of a legally enforceable debt. It is stated that both the Courts below have failed to appreciate that the complainant did not produce his income tax returns to show whether the said loan of



Rs.50,00,000/-given in cash was recorded in the balance sheet. It is stated that the learned Trial Court could have taken cognizance of the matter only if the complainant was able to discharge his burden of proof that the transaction, if any, between the parties was legal and, therefore, the debt was recoverable. It is also argued that the complainant has lodged several similar cases against number of persons, who have been trapped by the complainant. It is also argued that the petitioner had taken Rs. 15 lakh from respondent no. 2 *vide* cheque dated 07.09.2017 drawn on HDFC Bank, Saket, New Delhi as loan for his business purposes with an understanding to return the same with Rs. 1 lakh as interest. It is stated that an amount of Rs. 15,53,000/- already stands paid to respondent no. 2 over a period of time. It is stated that complainant/respondent no. 2 is a legal money lender who could not have given loan as mentioned by him since it is against law. It is also submitted that the complainant had also taken some blank signed papers, blank signed stamp papers and blank signed cheque from the petitioner. Therefore, it is argued that the present petition be allowed.

5. Learned counsel for the complainant/respondent no. 2, on the other hand, states that the case is at the stage of summoning and the contentions raised on behalf of petitioner herein are a matter of trial and cannot be raised at this stage since they are all triable issues. It is also stated that out of advanced loan of Rs. 50 lakhs, Rs. 15 lakhs were paid to the petitioner by cheque and Rs. 35 lakhs were paid by cash after withdrawal from bank accounts of respondent no. 2, and it was communicated to the Chartered Accountant for inclusion in his income tax record. It is also stated that the petitioner has already made



repayment of Rs. 15,63,000/- out of which an amount of Rs. 6,98,000/- was paid in cash. Therefore, there is an acknowledgement of debt by the petitioner upon part repayment, that too partially in cash. It is also stated that the petitioner had drawn the cheque in question in the sum of Rs. 50 lakhs in favour of respondent no. 2 and there are Whatsapp chat messages to prove that the petitioner had instructed respondent no. 2 to deposit the said cheque. It is also stated that there is an undertaking given by the petitioner to respondent no. 2 on a stamp paper to repay the amount in question. It is also stated that no complaint was ever lodged by the petitioner regarding the complainant forcing him to deliver the cheque in question. It is also stated that the presumption under Section 139 of NI Act is against the petitioner and thus, the issues being raised cannot be adjudicated by this Court under Section 482 of Cr.P.C. and, therefore, the petition be dismissed.

6. This Court has heard arguments addressed by both the learned counsels and has gone through the case file and material on record.

7. The order dated 13.04.2018 passed by the learned Trial Court, by way of which the petitioner was summoned in CC No. 4617/2018, reads as under:

“Ld. Counsel for the complainant submits that the complainant maintains his/its bank account at Saket which is within the jurisdiction of this court

Pre-summoning evidence by way of affidavit tendered. The complainant has closed pre-summoning evidence.

Complainant alongwith documents perused. The same is within limitation and jurisdiction of this Court.

Arguments heard on the point of summoning.

From perusal of the record, there are sufficient grounds for proceeding forward.



I take cognizance of the offence u/s 138 NI Act.

Issue summons to the accused ...”

8. Further, the concluding portion of order dated 20.09.2018 passed by the learned Revisional Court, dismissing the challenge to the summoning order, reads as under:

“8.Be that as it may, all the above contentions raised by counsel for petitioner as well as objection regarding money lending Act are the defence to be taken by petitioner before Id. Trial court and cannot be looked into by this court in revision petition while considering the illegality or infirmity in the summoning order passed by the Ld. Trial court, which this court did not find, hence revision petition stands dismissed...”

9. In the present case, the learned Revisional Court has observed that the petitioner had not disputed the issuance of cheque, rather, the petitioner’s contention was that the cheque had been obtained from him by the complainant forcibly. However, the petitioner could not put forth any material on record to show as to whether he had lodged any complaint with the police in this regard. To the contrary, the complainant had referred to WhatsApp messages between the parties reflecting that it was the petitioner himself who had given the go ahead for deposit of the cheque in bank.

10. As per complainant, he had advanced Rs. 50 lakhs to the petitioner out of which he had paid Rs. 15 lakhs through cheque and remaining amount was paid in cash after withdrawing from his bank account. The complainant/respondent no. 2 has annexed alongwith his complaint under Section 138 of NI Act, the chats between him and the petitioner wherein the petitioner is stated to have given a go ahead to the respondent to deposit the cheque with his bank for encashment. He



has also placed reliance upon an undertaking given by the petitioner herein to the complainant that he would repay the loan amount of Rs.50 lakhs that he has obtained from the complainant. The petitioner has not disputed his signatures on the cheque as he states that the complainant had forcibly obtained blank signed papers, blank signed stamp papers and blank signed cheque from him. However, as rightly held by the learned Revisional Court, the petitioner has not lodged any complaint with the authorities in respect of any such incident.

11. Now, the primary contention raised on behalf of the petitioner herein is that the loan advanced to the petitioner by the complainant, as alleged, was not a 'legally' recoverable debt and thus, no presumption would rise under Section 139 of NI Act.

12. To appreciate this contention, it will be essential to take note of Section 118(a) and 139 of NI Act which read as under:

“118. Presumptions as to negotiable instruments.—Until the contrary is proved, the following presumptions shall be made:—

(a) **of consideration:**—that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”

13. *De hors* the other contentions raised on behalf of the petitioner, it is not disputed that the petitioner had signed on the cheque in question and the same belongs to him. When the signatures on the cheque have been admitted by the petitioner, the presumption under Section 118(a)



and 139 of NI Act would arise and it would be presumed that the cheques in question had been issued by the petitioner towards some legally enforceable debt. However, such a presumption can be rebutted by an accused by raising a probable defence. In this regard, it shall be apposite to consider the observations of Hon'ble Apex Court in case of ***Basalingappa v. Mudibasappa* (2019) 5 SCC 418** whereby it was held as under:

“25. We having noticed the ratio laid down by this Court in the above cases on Sections 118 (a) and 139, we now summarise the principles enumerated by this Court in following manner:

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence.”

(Emphasis supplied)

14. Further, as regards the argument of the learned counsel for petitioner that existence of ‘legally recovery debt’ is not a matter of presumption under Section 139 of the Act as held in ***Krishna***



Janardhan Bhat (*supra*) by Hon'ble Apex Court, this Court notes that the precedent cited by the learned counsel for petitioner stands overruled by the Three-judges Bench of the Hon'ble Apex Court in ***Rangappa v. Sri Mohan*** (2010) 11 SCC 441 on this point itself, whereby it was held that presumption under Section 139 would include existence of a 'legally' enforceable debt or liability. The relevant portion of the decision reads as under:

22. With respect to the decision cited above, counsel appearing for the respondent-claimant has submitted that the observations to the effect that the 'existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act' and that 'it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability' (see p. 62, para 30 in *Krishna Janardhan Bhat*) are in conflict with the statutory provisions as well as an established line of precedents of this Court. It will thus be necessary to examine some of the extracts cited by the respondent-claimant. For instance, in *Hiten P. Dalal v. Bratindranath Banerjee*³ it was held (Ruma Pal, J. at SCC pp. 24-25, paras 22-23):

"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, ... it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused.' ...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 probability 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, the discretion is left with the Court 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’

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."

(emphasis supplied)

23. The respondent-claimant has also referred to the decision reported as *Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm & Ors.*⁴, wherein it was observed: (SCC p. 660, para 17)

"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. ..."

24. This decision in *Mallavarapu Kasivisweswara Rao*⁴ then proceeded to cite an extract from the earlier decision in *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal*⁵: (SCC pp. 50-51, 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 improbably 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 (supra).

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 Bhat*² may not be correct...**"

(Emphasis supplied)

15. Thus, in the given set of facts and circumstances as already



discussed above, and having gone through the contents of the petition and the material on record, this Court is of the opinion that the arguments addressed and the issues raised before this Court can only be considered and appreciated during the course of trial at appropriate stage as per law, when the complainant has been able to establish a *prima facie* case for the purpose of summoning the accused/petitioner. There are no reasons to interfere with the impugned summoning order, as well as the order dated 20.09.2018 of the learned Revisional Court whereby all the contentions raised before this Court were recorded and considered.

16. Accordingly, the present petition stands dismissed along with pending application.

17. Nothing expressed hereinabove shall tantamount to an expression of opinion on merits of the case.

18. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

SEPTEMBER 13, 2023/ns