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

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Reserved on: 03.02.2023
Pronounced on: 20.03.2023

+ **CRL.REV.P. 702/2018**

SMT. UMA DEVI

..... Petitioner

Through: Mr. D.B. Yadav, Advocate
alongwith petitioner in person

versus

SMT. SHASHI BALA

..... Respondent

Through: Mr. Rohit Boora, Ms. Swati
Rathi and Mr. Vishal Nehra,
Advocates

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present criminal revision petition has been filed by the petitioner under Sections 397 and 401 of the Code of Criminal Procedure, 1973 against the impugned judgment dated 08.08.2018 passed by learned Additional Sessions Judge, Rohini, Delhi, (*hereinafter 'learned ASJ'*) whereby Criminal Appeal No. 76/2018 filed by the petitioner was dismissed.

2. The petitioner *vide* judgment dated 25.09.2017 was convicted under Section 138 of Negotiable Instruments Act, 1881 by learned Metropolitan Magistrate-3, Rohini Courts, Delhi (*hereinafter*

'learned MM') in Case No. 15/4R/16 titled "*Shashi Bala vs. Uma Devi*" and *vide* order on sentence dated 28.03.2018, was directed to pay compensation amounting to Rs.16 lakhs i.e. double the amount of cheques in question, and in default of same, to undergo simple imprisonment for four months.

3. To state briefly, the case of complainant was that the petitioner and her husband were inducted as tenants in the premises of the complainant, which they had taken on rent for residential purpose as well as for commercial purpose i.e. for running the business of manufacturing frames of goggles/spectacles. It was alleged that soon thereafter, the petitioner and her husband had approached the complainant for obtaining a friendly loan for the purpose of enhancing the business and considering the friendly terms and relations between the parties, the complainant had agreed to the demand of petitioner as petitioner had also assured the complainant to take her in the said business as one of the partners. It was alleged that on pretext of such false and mischievous promises, the petitioner and her husband were able to take a sum of Rs.4 lakhs from the complainant in the year 2002, and thereafter, Rs.1,75,000/-, Rs.1,00,000/-, Rs.50,000/- and Rs.25,000/- on other different occasions till November, 2004. It was also alleged that after taking the final amount of Rs.25,000/- in November 2004, the petitioner had promised the complainant to return the entire loan amount within a period of one month from the date of receiving the final amount. It was further the case of complainant that in discharge of the liability towards the complainant, the petitioner had issued two post-dated

cheques i.e. cheque bearing number 265451, dated 27.12.2004 and cheque bearing number 265452, dated 03.01.2005, each for a sum of Rs.4 lakhs, drawn on Union Bank of India, Mangolpuri, Delhi-110083. The said cheques were presented by the complainant before her banker i.e. Canara Bank, Rohini, Sector-03, Delhi on 03.01.2005, but to the utter shock and surprise of the complainant, the said cheques were returned *vide* returning memo dated 05.01.2005 with the remarks 'Funds Insufficient'. Thereafter, the statutory legal notice of demand was issued by the complainant on 14.01.2005, informing the petitioner regarding the dishonour of the cheques issued by her and demanding the amount in question within 15 days from the receipt of the notice. Subsequently, the petitioner had issued a reply to the legal notice dated 22.01.2005 by virtue of which she had denied to make any payment to the complainant. Thereafter, the present complaint under Section 138 of Negotiable Instruments Act, 1881 was filed before the learned MM.

4. During the course of trial, the complainant got herself examined as CW-1 whereby she reiterated the contents of her complaint and also proved the following documents: (i) The cheque no.265451 Ex.CW-1/A, (ii) The cheque no.265452 Ex.CW-1/B, (iii) Debit advice receipt of Canara Bank Ex.CW-1/C, (iv) Return memo of the Union Bank of India Ex.CW-1/D, (v) Registered post receipt dated 14.01.2005 Ex.CW-1/E, (vi) UPC receipt Ex.CW-1/F, (vii) AD card Ex.CW-1/G, and (viii) Legal Demand Notice Ex.CW-1/H.

5. Statement of the petitioner was recorded under Section 313 of Cr.P.C. whereby she denied having borrowed any amount from the

complainant and stated that the cheques in question had been stolen by the complainant when the petitioner and her husband were residing as tenant in her house, only with a view to evict them from the tenanted premises. It was also stated that the petitioner had not received any legal notice as envisaged under Section 138 of Negotiable Instruments Act, 1881. Furthermore, in the defence evidence, the petitioner had examined two witnesses: (i) DW-1 i.e. husband of the petitioner and (ii) DW-2 i.e. husband of the complainant.

6. After hearing the final arguments and appreciating the evidence on record, the petitioner herein, *vide* Judgment dated 25.09.2017 was convicted under Section 138 of Negotiable Instruments Act, 1881.

7. The operative portion of judgment dated 25.09.2017 passed by learned Metropolitan Magistrate reads as under:

“32. In the instant case the accused has not brought any material on record or any probable defence which would rebut the shadow of presumption existing in favour of the Complainant. This court do not find any force in the arguments advanced by the learned counsel for the accused that the accused has succeeded in rebutting the presumption under Section 118(a) and section 139 of the NI Act. The evidence lead by the accused is not at all sufficient to discharge the burden of presumption casted upon the accused by virtue of provisions of Section 118 (a) and 139 of the NI Act. Therefore, from the materials brought on record and evidence lead by the complainant it is proved that the accused has given the cheques Ex CWI/A and Ex CWI/B to the complainant in discharge of her loan liability and for consideration. Further it also stands proved that the accused

has not made any payment to the complainant within 15 days of the receipt of the legal demand notice.

33. Therefore, In view of the aforesaid discussion, I hereby hold that the complainant has proved and substantiated its allegation against the accused and all the ingredients of Section 138 of the NI Act also stands proved against the accused. Accordingly, accused Uma Devi W/o Sh. Surya Nath Tiwari is hereby convicted for the offence u/s 138 of the NI Act...”

8. The operative portion of order on sentence dated 28.03.2018 passed by learned Metropolitan Magistrate reads as under:

“...This Court is of view that ends of justice would meet if lenient view is taken as incarceration of convict would not serve any useful purpose. Thus, convict is directed to pay compensation amounting to Rs.16 lakhs i.e. double the amount of cheques in question and in default to undergo simple imprisonment for four months...”

9. Aggrieved by the decision of learned MM, the petitioner had preferred an appeal and the same was dismissed by learned ASJ thereby upholding the judgment and order passed by the learned MM. The operative portion of impugned judgment dated 08.08.2018 reads as under:

“26. Counsel for the accused has failed to show any infirmity in the said finding of the trial court. I also do not find any infirmity in the said findings of the trial court. Hence, it can be held that ,the accused has issued the cheques Ex.CWI/A and Ex.CWI/B in favour of the complainant in discharge of her loan liability and for consideration.

27. In view of the foregoing discussions, it can be held that the complainant/respondent proved the essential ingredients of section 138 NI Act beyond reasonable doubt against the accused. As such, I do not find any infirmity in the judgment dated 25.09.2017 and order on sentence dated 28.03.2018 passed by the trial court. Therefore, the appeal stands dismissed. TCR be sent back to the court concerned along with copy of this order.”

10. Aggrieved by aforesaid, learned counsel for the petitioner states that there was no loan agreement to show that any loan was taken by the petitioner from the complainant against which the alleged cheques were issued. It is stated that the complainant had stolen the cheque books of the petitioner and her husband and had thrown out all the household articles of the petitioner from the tenanted premises against which an FIR was also registered. It is stated that the petitioner was a tenant of the respondent at Rs.550/- per month and the complainant wanted to forcibly vacate the petitioner from the premises and against the said acts, the husband of the petitioner had also filed a suit under Section 45 of Delhi Rent Control Act against the complainant and her husband. It is also argued that even as per own version of the complainant she had borrowed the entire amount, except Rs.25,000/-, from her brother however, the complainant did not produce her brother as a witness for examination.

11. On the other hand, learned counsel for complainant argued that there is no infirmity with both the orders of learned MM and learned ASJ, and all the contentions and arguments of the petitioner have

already been dealt with in detail by both the Courts below.

12. This Court has heard the arguments of both the parties and have perused the material placed on record.

13. Before proceeding to the merits of the case, a quick reference to Section 138 of Negotiable Instruments Act, 1881 can be made as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account.

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for 8[a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, “debt of other liability” means a legally enforceable debt or other liability.”

14. The allegations against the present petitioner were that she and her husband had obtained a loan of total amount of Rs.8 lakhs from the complainant and in view of discharge of same, had issued two cheques of Rs.4 lakhs each, which had got dishonoured on their presentation by the complainant.

15. A perusal of the impugned orders and the Trial Court Record reveals that the petitioner did not dispute her signatures on the cheques in question throughout the course of trial and in fact, at the time of framing notice under Section 251 of Cr.P.C., the petitioner had specifically admitted that the signature on the cheques in question belong to her whereas all other particulars had not been filled by her. The husband of the petitioner i.e. DW-1 also in his cross-examination admitted that the cheques in question bear the signature of his wife i.e. the petitioner herein. Even as per the reply to legal notice dated 22.01.2005 i.e. Ex.CW-1/Z, the petitioner had admitted that she had issued the said cheques in favour of the complainant, though had stated that the same were blank signed cheques. Therefore the signatures on the cheques, being that of the petitioner remain undisputed. The fact that the cheques in question

were dishonoured on their presentation by the complainant *vide* returning memo dated 05.01.2005 with remarks 'Funds Insufficient' has also not been disputed and, thus, stands proved.

16. Though one of the defence of the petitioner before the Courts below was that petitioner had not received any legal notice of demand, the said defence was rejected after considering the documents placed on record by the complainant qua the service of legal notice, and after the reply to legal notice issued by the counsel for petitioner was placed before the husband of petitioner i.e. DW-1 during cross-examination. The view of learned MM on this aspect was also upheld by the learned ASJ with the following observations:

“14. Before the trial court the accused raised a dispute that the legal notice Ex. CW-1/H was not served upon her. As held by the trial court and rightly so, that the said legal notice borne the same address which the accused mentioned in the documents filed by the accused. Further, admittedly, the accused had replied the said legal notice vide its reply dated 22.01.2005 Ex.CW-1/Z. Hence, it stands proved that the complainant issued the legal notice in compliance of Section 138 NI A and the same was duly received by the accused who also replied the same.”

17. Under such facts and circumstances, since the signatures on the cheques and the dishonourment of the same as well as receipt of legal notice of demand by the petitioner stands established, the presumption as envisaged under Section 118(a) and 139 of Negotiable Instruments Act would come into play. The said sections are reproduced herein-under for reference:

“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.”

18. In respect of presumptions under Section 118(a) and 139 of Negotiable Instruments Act, 1881, the Hon’ble Apex Court in ***K. Bhaskaran v. Sankaran Vaidhyan Balan & Anr.*** (1999) 7 SCC 510 had held as under:

“9. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The Trial Court was not persuaded to rely on the interested testimony of DW-1 to rebut the presumption. The said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect.”

19. The object of Section 139 was elaborated by Hon’ble Apex Court in ***Rangappa v. Sri Mohan*** (2010) 11 SCC 441 in the

following manner:

“27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of ‘preponderance of probabilities’. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own

20. In *Basalingappa v. Mudibasappa* (2019) 5 SCC 418, the Hon’ble Apex Court, after taking note of several judicial precedents, has summed up the relevant principles 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)

21. It is the case of petitioner that she was able to rebut the presumption raised in favour of holder/complainant by raising probable defence, but the same was not appreciated correctly by the Courts below. Learned counsel for the petitioner contended before this Court as under:

- i. There was no loan agreement between the parties to show that petitioner had taken any loan from the complainant, and

the complainant had failed to show any source of income as as to be able to give loan of such an amount.

- ii. As per case of the complainant, she had given only Rs.25,000 and rest of the amount was given by her brother, who was not examined during the trial.
- iii. The complainant had stolen the cheque books of the petitioner from the tenanted premises.
- iv. The complainant wanted to forcibly evict the petitioner from the tenanted premises, against which the husband of the petitioner had also filed a suit under Section 45 of Delhi Rent Control Act against the complainant and her husband, due to which the complainant had filed the present complaint which is false and frivolous.

22. A perusal of orders passed by the learned MM and learned ASJ reveals that the aforesaid arguments and contentions have already been dealt with in-depth by both the Courts concerned and this Court finds no illegality or infirmity in the same.

23. With respect to the argument regarding source of loan amount and absence of loan agreement, it has been rightly observed by learned ASJ that the complainant i.e. CW-1 had categorically stated during her cross-examination that except the last installment of Rs.25,000/-, the remaining amount given to the petitioner had been borrowed by the complainant from her brother who was owner of large number of properties and was involved in property business, and a perusal of testimonies would reveal that no contrary suggestion to the aforesaid was made during the cross-examination. Further, the

husband of the complainant, who was examined as a defence witness i.e. DW-2, also deposed that petitioner had taken loan from his wife i.e. complainant and had promised to return the same by December, 2004 for which cheques were issued and signed by petitioner in presence of DW-2. Even otherwise, there are contradictions in the argument of the learned counsel for petitioner insomuch as the defence taken by the petitioner in reply to legal notice issued on her behalf i.e. Ex.CW-1/Z was that the cheques in question were given as blank security cheques by the petitioner in discharge of a loan of Rs. 10,000/-, in contrast to Rs. 8 lakhs claimed by the complainant.

24. As far as the contentions of learned counsel for petitioner that the Courts below failed to consider the fact that complainant had stolen the cheque book of the petitioner and filed false case in order to force the petitioner's family to vacate the tenanted premises are concerned, the same, in this Court's opinion are without any merit. The issue as to whether the cheques/cheque books were stolen by the complainant was dealt in detail by the learned MM as well as by learned ASJ. The facts, as they emerge from the record, are that (i) *firstly*, the signatures of the petitioner on the cheques in question were never disputed, rather admitted by the petitioner herself, and it had nowhere been stated by the petitioner or contended on her behalf that she had put her signatures on the blank cheques in her cheque book, (ii) *secondly*, in the reply to legal notice dated 22.01.2005, the petitioner had stated that she had given six blank cheques on 05.11.2014 to the complainant against the loan of Rs.10,000/- agreed to be paid by the complainant to her with assurance that after

receiving each installment, she would hand over one cheque but the same was not done, which is in entire contradiction to the plea regarding theft of cheques that has been repeatedly taken before the Courts on behalf of the petitioner, (iii) *thirdly*, an FIR was lodged by the petitioner's husband on 04.10.2005 for an alleged theft of articles i.e trunk from their rented premises against unknown persons, without any mention of cheques/cheque books been stolen by anybody, (iv) *fourthly*, on 06.10.2005, the petitioner's husband had made a complaint to the DCP concerned whereby it was further stated that a cheque book had been stolen by the complainant from their premises, however, no specific details of the cheque book had been mentioned, (v) *fifthly*, the FIR and the complaint to the DCP were lodged in November 2005, whereas the cheques in question had already been dishonored in January 2005, (vi) *sixthly*, the petitioner's husband i.e. DW-1 had stated in his cross-examination that he had not made any complaint to his bank regarding the theft of his joint account cheque book, and (vii) *seventhly*, the complainant's husband i.e. DW-2, who was summoned as defence witness, also deposed that he was not aware about stealing of cheques and any misuse thereof. Further, the argument of the learned counsel for petitioner that the present case was filed as a counter-blast to the proceedings initiated by the petitioner's husband under Delhi Rent Control Act, is also devoid of any merit since the petition under Section 45 of Delhi Rent Control Act was filed by the petitioner's husband on 22.09.2005, which is much later than the issuance and dishonor of cheques in question and filing of present complaint by the complainant. In light

of these facts, this Court does not find merit in the arguments of the learned counsel for petitioner.

25. In such facts and circumstances, both learned MM and learned ASJ have rightly held that the defence raised and material placed on record by the petitioner had been insufficient in order to rebut the presumption raised in favour of complainant under Section 118(a) and 139 of Negotiable Instruments Act, 1881.

26. Thus, in view of foregoing discussion, this Court finds no infirmity, illegality or perversity in the impugned judgments and orders passed by both learned ASJ and learned MM. The order on sentence dated 28.03.2018 passed by learned MM is upheld.

27. Accordingly, the present petition stands dismissed alongwith pending application, if any.

28. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MARCH 20, 2023/zp