



2024:DHC:9988



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:24.12.2024

+ **CRL.REV.P. 116/2023, CRL.M.A. 12622/2024 &
CRL.M.(BAIL) 178/2023**

M/S KASAN VARNISHA AND PAINT INDUSTRIES

.....Petitioner

versus

SUJAY THAPA

.....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Vijay Datt Gahtori, Mr. Rishabh Rai,
Mr. Ashutosh Sharma & Mr. Rakesh Datt
Gahtori, Advocates.

For the Respondent : Mr. K.K. Sharma, Mr. Mohit Sharma &
Mr. Harshit Aggarwal, Advocates.

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition is filed against the judgment dated 11.01.2023 (hereafter '**impugned judgment**') passed by the learned Additional Sessions Judge ('**ASJ**'), South District, Saket Courts in Criminal Appeal No. 26/2022.



2. By the impugned judgment, the learned ASJ upheld the judgment dated 17.11.2021 and order on sentence dated 23.12.2021 passed by the learned Metropolitan Magistrate ('MM'), Saket Courts, New Delhi whereby the accused – Jeevan Kumar was convicted of the offence under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act'), and was sentenced to pay a fine of ₹5,20,000/- as compensation, and in default to undergo simple imprisonment for a period of one month.

3. The brief facts leading to the filing of the present case are that in the month of February, 2010, one Jeevan Kumar approached the respondent/complainant stating that he is running a business of chemicals in the name and style of M/S Kasan Varnisha and Paint Industries, Kasan Almora and that he is the sole proprietor of the firm. It is the case of the respondent that he had invested money to the tune of ₹20,00,000/- in M/S Kasan Varnisha and Paint Industries through Jeevan Kumar on the assurance of getting good returns. It is alleged that initially, the respondent did receive some profits in return, however, subsequently; the said Jeevan Kumar stopped returning any amount. It is alleged that thereafter in December 2012, Jeevan Kumar gave three post dated cheques to be presented in the months of January – March, 2013.

4. It is alleged that thereafter upon presentation of one of the cheques for a sum of ₹3,00,000/- being cheque No. 502576 dated 30.01.2013, the same got dishonoured and returned unpaid with



remarks “*Stop Payment.*” Subsequently, upon the non-payment of the cheque amount by Jeevan Kumar, despite receipt of legal demand notice, the respondent filed the subject complaint under Section 138 of the NI Act.

5. Petitioner in his defence stated that his cheque book was lost in the year 2013, and he had lodged a police complaint in this regard around one month before the date of presentation of the cheque in question. He stated that he had also given instructions to his banker in this regard. He further stated that he and the respondent were partners in the petitioner firm, and the respondent had invested some money in the said firm as a partner. He further stated that he had already returned an amount of ₹12-13 lakhs to the respondent. He admitted that the cheque in question contained his signature, and that he had received the legal demand notice, and had also replied to the same.

6. The learned MM *vide* judgment dated 17.11.2021 convicted the accused – Jeevan Kumar, proprietor of the petitioner firm of the offence under Section 138 of the NI Act. It was noted that the accused – Jeevan Kumar, in his statement of defence, admitted his signatures on the cheque but claimed that he had never issued the cheque in question.

7. The learned MM noted that the accused did not dispute his signatures on the subject cheque. It was noted that on a bare perusal of the cheque, it is unclear whether the same was issued by the accused – Jeevan Kumar in the capacity of a partner or proprietor. It was noted



that the accused – Jeevan Kumar, be it in the memo of parties, title of the complaint and in the complaint, is described as the sole proprietor of the said firm.

8. It was noted that the legal demand notice dated 10.02.2013 was also addressed to the accused – Jeevan Kumar as proprietor of the petitioner firm. It was noted that when the notice was given, accused – Jeevan Kumar stated that he had received them, and also stated that he had replied to them. It was noted further that the legal demand notice contained facts like – the accused Jeevan Kumar was the proprietor of the said firm, that the cheque was issued in discharge of legal debt and since the accused failed to bring any reply on record, an adverse inference had to be drawn against him.

9. The learned MM noted that when Sh. Bishan Giri was examined as a Court witness, the record pertaining to the cheque in question were exhibited, and the account name mentioned therein was - “*M/S Kasan Warnish & and Paint Industries, Kasan Prop. Jeewan Kum*”. It was noted that the alleged partnership deed furnished by the respondent was executed on 01.04.2010, and the said bank account was opened on 12.11.2010, that is, after the execution of the partnership deed. In view of the aforesaid, it was noted that the subject cheque was issued by the accused – Jeevan Kumar as a proprietor of the petitioner firm and not as a partner.

10. It was noted that while the accused – Jeevan Kumar contended that the cheque was never given by him, and the same was contended



to be lost in the year 2013 for which a police complaint was allegedly filed but the accused failed to substantiate his defence. It was noted that the accused – Jeevan Kumar, in his statement under Section 313 of the CrPC, himself stated that he had repaid some money to the respondent by withdrawing it from his bank account and that he had receipts in that regard, however he failed to produce any such receipts.

11. The learned MM noted that as per the testimony of the Court witness, the cheque was presented, however the same was returned unpaid due to insufficient funds. It was noted that the said witness also duly acknowledged that the deposit slip placed on record contained the appropriate remark of “*Insufficient funds*”. In view of the aforesaid, the learned MM convicted the accused – Jeevan Kumar of the offence under Section 138 of the NI Act, and sentenced him to pay a fine of ₹5,20,000/- as compensation, and in default to undergo simple imprisonment for a period of one month. Aggrieved by the same, Jeevan Kumar preferred an appeal before the learned ASJ.

12. The learned ASJ *vide* the impugned judgment upheld the order passed by the learned MM. The learned ASJ noted that when the summons were issued by the learned Trial Court, the accused adopted dilatory tactics and the situation escalated to issuance of process under Section 82 of the CrPC. It was noted that the accused appeared in the Court with the application for cancellation of process whereupon he was admitted on bail. It was noted that the accused again attempted to adopt dilatory tactics by not appearing on the adjourned date either in



person or through properly authorized counsel. It was noted that the accused had chosen to send a proxy counsel with an exemption application. The learned Trial Court thereby allowed the exemption but did not allow any further adjournment for the accused and closed the right to file application under Section 145(2) of the NI Act. Consequently, the evidence of the complainant remained as is.

13. It was noted that sufficient opportunity was granted to the accused to lead evidence in defence but he tried to protract the matter for one reason or other and did not lead any evidence in defence for at least 14 dates spanning approximately 2 years due to which the learned Trial Court closed the opportunity of leading defence evidence. Thereafter, despite opportunity, the accused did not advance final arguments and the learned Trial Court granted opportunity to him to file written arguments, however, in place of doing so, the accused – Jeevan Kumar filed an application under Section 311 of the CrPC which was dismissed. It was consequently noted that despite being given sufficient opportunities, the accused failed to take steps to defend himself. It was noted that in this manner, the affidavit of the respondent remained un rebutted.

14. The learned ASJ however noted that the learned MM erred in exercising *suo moto* power under Section 311 of the CrPC, and summoning bank witness whose testimony was recorded as Court witnesses. It was noted that since the accused was not granted any



opportunity to cross examine the court witnesses, their testimony could not be relied upon.

15. It was noted that the accused failed to lead evidence to show that the cheques were misused. The learned ASJ also considered the argument of the accused regarding there being no return memo to indicate the reason for dishonour of cheque. The learned ASJ however noting that regardless of the reason for dishonour of cheque, since the same was not honoured upon presentation, the accused could have been prosecuted against under Section 138 of the NI Act. It was noted that it was not in dispute that the cheque was presented to the bank, and since the complainant produced the cheque in Court, it can safely be said that the bank returned the cheque to the complainant, and the amount was not credited.

16. The learned ASJ further noted that even if the claim of the accused himself is taken that he had issued stop payment instructions to the bank, it was upon him to justify his actions and raise a defence. In that light, the learned ASJ upheld the conviction of the accused – Jeevan Kumar under Section 138 of the NI Act. Aggrieved by the same, the petitioner has filed the present petition.

17. The learned counsel for the petitioner submitted that the impugned judgment is based on conjectures and ought to be set aside. He submitted that the learned ASJ and the learned MM failed to appreciate that during the trial, the respondent failed to prove his case as no return memo regarding the dishonoured cheque had been placed



on record, and the same had not been exhibited. He submitted that the alleged endorsement of the dishonouring of cheque showed that the cheque was dishonoured due to “*funds insufficient*”, however, in the complaint it was stated that the cheque was returned due to “*stop payment*”. He submitted that the same is contradictory in nature.

18. He submitted that even the Court Witness, Deepak Kumar, in his evidence categorically stated that the return memos with appropriate remarks in context of cheques are only generated if specifically asked for. He submitted that from the said deposition, it is apparent that the bank of the respondent did not give any return memo pertaining to the dishonour of the cheque since the respondent never asked for the same. He consequently submitted that the respondent had failed to prove his case.

19. The learned counsel for the respondent submitted that since the signatures on the cheques were admitted, the presumptions were raised against the accused – Jeevan Kumar, and in favour of the respondent. He submitted that while the presumptions are rebuttable in nature, it was for the accused to have raised a probable defence. He submitted that but for the arguments on technicalities, the accused failed to raise a probable defence and was not able to rebut the presumptions raised against him.

Analysis



20. Since the present revision petition has been filed under Section 397 of the CrPC, challenging the concurrent findings of both lower courts, this Court's role is limited to assessing the correctness, legality, and propriety of the impugned judgment.

21. It is trite law that this Court is required to exercise restraint and should not interfere with the findings in the impugned orders or reappreciate evidence merely because another view is possible unless the impugned orders are wholly unreasonable or untenable in law (Ref. *Sanjaysinh Ramrao Chavan v. Dattaray Gulabrao Phalke* : (2015) 3 SCC 123). It is not open to the Court to misconstrue the revisional proceedings as a second appeal by sitting in appeal over the challenged orders. The Hon'ble Apex Court in the case of *State of Kerala v. Puttumana Illath Jathavedan Namboodiri* : (1999) 2 SCC 452 discussed the scope of revisional jurisdiction and held as under:

"5. In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice...."

(emphasis supplied)



22. It is also well settled that once the execution of the cheque is admitted, the presumption under Section 118 of the NI Act that the cheque in question was drawn for consideration and the presumption under Section 139 of the NI Act that the holder of the cheque/respondent received the cheque in discharge of a legally enforceable debt or liability are raised against the accused [Ref. ***Rangappa v. Sri Mohan* : (2010) 11 SCC 441**].

23. The Hon'ble Apex Court in ***Rajesh Jain v. Ajay Singh* : (2023) 10 SCC 148**, while discussing the appropriate approach in dealing with presumption under Section 139 of the NI Act, observed the following :

“54. Once the presumption under Section 139 was given effect to, the courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the court can straightaway proceed to convict him, subject to satisfaction of the other ingredients of Section 138. If the court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the said fact independently, without taking aid of the presumption. The court would then take an overall view based on the evidence on record and decide accordingly.

55. At the stage when the courts concluded that the signature had been admitted, the court ought to have inquired into either of the two questions (depending on the method in which the accused has chosen to rebut the presumption) : Has the accused led any defence evidence to prove and conclusively establish that there existed no debt/liability at the time of issuance of cheque? In the absence of rebuttal evidence being led the inquiry would entail :



Has the accused proved the non-existence of debt/liability by a preponderance of probabilities by referring to the “particular circumstances of the case”?

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57. Einstein had famously said: “If I had an hour to solve a problem, I'd spend 55 minutes thinking about the problem and 5 minutes thinking about solutions.”

Exaggerated as it may sound, he is believed to have suggested that quality of the solution one generates is directly proportionate to one's ability to identify the problem. A well-defined problem often contains its own solution within it.

58. Drawing from Einstein's quote, if the issue had been properly framed after careful thought and application of judicial mind, and the onus correctly fixed, perhaps, the outcome at trial would have been very different and this litigation might not have travelled all the way up to this Court.

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61. The fundamental error in the approach lies in the fact that the High Court has questioned the want of evidence on the part of the complainant in order to support his allegation of having extended loan to the accused, when it ought to have instead concerned itself with the case set up by the accused and whether he had discharged his evidential burden by proving that there existed no debt/liability at the time of issuance of cheque.”

(emphasis supplied)

24. At the outset, since the execution and signature on the cheque is not disputed, presumption under Section 138 and 118 of the NI Act is raised against the petitioner and in favour of the respondent.

25. From a perusal of the statement of the petitioner under Section 313 of the CrPC, it is apparent that the petitioner does not dispute that the respondent had advanced a sum of ₹20,00,000/- to the petitioner.



The petitioner in fact admitted that he had already returned a sum of ₹12,00,000/- by way of various cash installments. He stated that the said amount was arranged by him by withdrawing the same from his bank account, and that he also had receipts in that regard.

26. The petitioner, however, disputed issuing the subject cheque. He stated that the cheques in question were misplaced from his office in around December 2012 for which he had lodged a complaint in Police Station Patwari Kshetra, and had also given stop payment instructions to his banker. He further stated that he did receive the notice, and that he had replied to the same.

27. From a perusal of the impugned judgment, it is apparent that the learned ASJ took into account all the contentions of the petitioner. It was noted that since the petitioner had admitted his signatures on the cheque, the presumptions under Section 139 and 118 were raised against the petitioner.

28. It is pertinent to note that the presumptions under Section 118 and 139 of the NI Act are not absolute, and may be controverted by the accused. In doing so, the accused ought to raise only a probable defence on a preponderance of probabilities to show that there existed no debt in the manner so pleaded by the complainant in his complaint/demand notice or the evidence. Once the accused successfully raises a probable defence to the satisfaction of the Court, his burden is discharged, and the presumption 'disappears.' The burden then shifts upon the complainant, who then has to prove the existence of such



debt as a matter of fact. The Hon'ble Apex Court in **Rajesh Jain v. Ajay Singh** (*supra*), in this regard has observed as under:

“41. In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words ‘until the contrary is proved’ occurring in Section 139 do not mean that accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist. [Basalingappa Vs. Mudibasappa (AIR 2019 SC 1983) See also Kumar Exports Vs. Sharma Carpets (2009) 2 SCC 513]

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44. The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling the burden may likewise shift to the complainant. It is open for him to also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact. In Kundanlal's case- (*supra*) when the creditor had failed to produce his account books, this Court raised a presumption of fact under Section 114, that the evidence, if produced would have shown the non-existence of consideration. Though, in that case, this Court was dealing with the presumptive clause in Section 118 NI Act, since the nature of the presumptive clauses in Section 118 and 139 is the same, the analogy can be extended and applied in the context of Section 139 as well.

45. Therefore, in fine, it can be said that once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption 'disappears' and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his



complaint case. Thereafter, the presumption under Section 139 does not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. [Basalingappa vs. Mudibasappa, AIR 2019 SC 1983; See also, Rangappa vs. Sri Mohan (2010) 11 SCC 441]"

(emphasis supplied)

29. In the present case, the petitioner sought to raise a probable defence by stating that the cheques in question were misplaced from his office for which he had lodged a police complaint and had given intimation to the bank. Though pleaded that the cheques were stolen, and that he had filed a police complaint, the petitioner failed to lead any evidence to corroborate the same. The petitioner failed to produce or append a copy of such police complaint. In the absence of any evidence to substantiate his claim, a bare averment that a police complaint had also been filed does not suffice to refute the presumption raised against the petitioner under Sections 139 and 118 of the NI Act.

30. The main thrust of the petitioner's case is that the reason for the dishonour of the cheque as depicted by the complainant in the complaint and the notice are contradictory in nature. It is the petitioner's contention that while the deposit slip mentioned that the subject cheque was dishonoured for the reason of "*funds insufficient*", the notice as well as the complaint stated that the cheque was returned unpaid due to the reason that "*stop payment*" instructions were issued. It is his case that no return memo was ever asked from the bank by the respondent. The petitioner, for this reason, contended that the



respondent failed to prove his case against the petitioner. Such contentions, in the opinion of this Court, are fallacious in nature.

31. Since the signatures on the cheque were not disputed, the presumptions were raised against the petitioner under Section 139 and 118 of the NI Act. It was thus up to the petitioner to raise a probable defence on a preponderance of probabilities to contend that there existed no debt/liability in the manner as pleaded by the respondent.

32. Even if the petitioner's case is taken at the highest, even dishonouring of cheque due to "*stop payment*" instructions fall within the ambit of Section 138 of the NI Act. It is not mandated that the complainant also ought to provide the reason for dishonour of the cheque. It was noted that the petitioner had not disputed that the cheque had been deposited by the complainant in the bank. The only dispute raised was that there was no cheque return memo, and therefore, the dishonour of the cheque was not proved.

33. In that regard, it was noted that Section 146 of the NI Act did not mandate a specific mode in which intimation of dishonour of cheque ought to be provided by the bank. In that light, the learned ASJ rightly noted that the written receipt of the dishonour of cheque was not mandatory. What was required was the fact that the cheque was presented to the bank, and the bank returned it unpaid, and informed the payee about the same. It was rightly noted that the complainant had produced the cheque in Court, thus, it could safely be said that the bank had returned the cheque to the complainant/respondent. It was



thus also safe to assume that the same was not credited in the bank account of the complainant.

34. It was also contended that the petitioner firm is a partnership firm, and therefore the complainant should not have made only Jeevan Kumar as accused. In that regard, as rightly noted by the learned ASJ, the petitioner himself contended that the bank account of the proprietorship firm of which he was the proprietor still belonged to him. It was rightly noted that since law does not distinguish between a proprietor and proprietorship firm, making only Jeevan Kumar was accused was not improper. It is also relevant to note that the petitioner is the signatory of the subject cheque.

35. The petitioner also sought to contend that while the learned MM had summoned bank witnesses as Court witnesses in the *suo moto* exercise of power under Section 311 of the CrPC, the procedure prescribed under Section 313 of the CrPC was not followed. While it is true that the learned MM should have afforded opportunity to the accused to refute the incriminating circumstances, and the procedure under Section 313 of the CrPC ought to have been followed, the same alone would not vitiate the trial unless prejudice is shown. In the present case, the petitioner has failed to show any prejudice caused to him.

36. Even otherwise, the learned ASJ did not rely upon the testimony of the Court witnesses while upholding the conviction of the petitioner under Section 138 of the NI Act. Since the signatures were not



disputed, the onus was on the petitioner to have raised a probable defence on a preponderance of probabilities that there existed no debt/liability in the manner as pleaded by the respondent.

Conclusion

37. From a perusal of the record, it is apparent that the petitioner had not led any evidence to controvert the presumptions against him under Section 118 and Section 139 of the NI Act. Once the signature on the cheque was admitted, it was for the petitioner to rebut, and establish a probable defence to show that on a preponderance of probabilities, there existed no debt/liability in the manner pleaded in the complaint/demand notice/affidavit evidence. In the opinion of this Court, the said burden had not been discharged.

38. In view of the above discussion, the learned ASJ rightly upheld the conviction of the petitioner under Section 138 of the NI Act, and the same cannot be faulted with.

39. The present petition is dismissed in the aforesaid terms.

AMIT MAHAJAN, J

DECEMBER 24, 2024