



2024:DHC:6898



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

Date of decision: 28th AUGUST, 2024

IN THE MATTER OF:

+ **CRL.L.P. 341/2024**

MOHD YAMEEN

.....Petitioner

Through: Mr. Kalicharan, Advocate.

versus

AAS MOHD

.....Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court challenging Judgment dated 30.04.2024 passed by learned Metropolitan Magistrate, N.I. Act, Karkardooma Courts, Delhi in Complaint Case No.1000/2021 acquitting the Respondent herein for offence under Section 138 of the Negotiable Instruments Act, 1881.

2. The Petitioner is the Complainant in CC No. 1000/2021 which is a complaint under Section 138 of the Negotiable Instruments Act. The complaint had been filed by the Petitioner with the following averments:-

- a) The Respondent/accused had friendly relationship with the Petitioner/Complainant. The accused was carrying out the business of *kabari*. It is stated that the Respondent borrowed a sum of Rs.50,000/- cash on 19.07.2019 from the Petitioner and an agreement was executed and attested by the notary public.
- b) It is stated that later on the Respondent/accused again requested



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the Petitioner/Complainant for a further sum of Rs.5 lakh and the Respondent/accused borrowed a sum of Rs.5 lakh in cash on 18.12.2020 from the Complainant to carry out the business of *kabari* on the promise that the Respondent/accused will pay the total amount of Rs.5,50,000/- within two months with interest. It is stated that despite several requests by the Petitioner/Complainant, the amount was not paid. It is stated that the Respondent/accused also filed a false complaint against the Petitioner in the Police Station.

- c) It is stated that in the Complaint that the Respondent had given a cheque being cheque No.164708 dated 18.12.2020 for a sum of Rs.5 lakh drawn on State Bank of Bikaner and Jaipur having its branch at Krishna Nagar, Delhi-110051 with a promise that the cheque can be encashed.
- d) It is stated that the cheque was presented for encashment but was dishonoured with the remark "funds insufficient" *vide* returning memo dated 02.03.2021. It is stated that the said fact was communicated to the Respondent/accused and the accused was asked to pay the money. It is stated that instead of discharging the liability of the cheque amount, the accused picked up a quarrel with the Petitioner/Complainant.
- e) It is stated that the Petitioner sent a legal notice to the Respondent on 03.03.2021 through registered AD/Speed Post through his Counsel calling upon the Respondent for repayment of the cheque amount within 15 days from the receipt of this notice. It is stated that since no reply was given by the Respondent within the time



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stipulated under Section 138 of the NI Act, the Petitioner filed a complaint under Section 138 of the NI Act against the Respondent.

f) Summons were issued to the Respondent and a full-fledged reply was filed. The Trial Court by the impugned judgment has dismissed the complaint filed by the Petitioner holding that:-

- i. The Complainant in his evidence has submitted that Rs.5 lakh has been given to the accused. However, in the cross-examination, he stated that he did not do any transaction with the accused after 24.09.2020.
- ii. There is no document executed for the loan of Rs. 5 lakh which has been given in cash. No witnesses have been examined who can depose in his favour.
- iii. The complainant runs a bakery shop but he stated that he does not maintain any kind of account for the said shop. He also stated that he has rental income of Rs.15,000-20,000/- per month but does not have any document to show the source of income and therefore it is difficult to believe that the complainant would have had the resources to give loan of Rs.5 lakhs. The case of the Complainant that he has given loan of Rs.5 lakh without any sufficient guarantee is not believable.

g) Aggrieved by the said order, the Complainant has approached this Court by filing the present criminal leave to appeal.

3. Sections 138 to 140 of the Negotiable Instruments Act read 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 a term which may extend to 68[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, 69[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 or other liability” means a legally enforceable debt or other liability.



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.

140. Defence which may not be allowed in any prosecution under Section 138.—It shall not be a defence in a prosecution for an offence under Section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section."

4. A perusal of Sections 138 to 140 of the NI Act shows that once the execution of cheque is admitted, a presumption is raised under Section 139 of the NI Act that the cheque has been issued for a liability. However, that presumption is rebuttable and it is for the accused to raise a probable defence. The standard of proof is one of preponderance of probabilities. The accused can rely on the evidence given by the complainant and also rely on material evidence supplied by him to raise the probable defence.

5. The Apex Court in Basalingappa v. Mudibasappa, (2019) 5 SCC 418, has succinctly summarized the principle regarding the presumption raised under Section 139 of the Negotiable Instruments Act. Paragraph 25 of the said judgment reads 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)

6. In Dattatraya v. Sharanappa, **2024 SCC Online SC 1899**, the Apex Court has observed as under:-

“19. Accordingly, to begin with, the bare provision of Section 139 of the NI Act, 1881 is reproduced herein below:

“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.”

The aforesaid presumption entails an obligation on the court conducting the trial for an offence under Section



*138 of the NI Act, 1881 to presume that the cheque in question was issued by the drawer or accused for the discharge of a particular liability. The use of expression “shall presume” ameliorates the conundrum pertaining to the right of the accused to present evidence for the purpose of rebutting the said presumption. Furthermore, the effect of such presumption is that, upon filing of the complaint along with relevant documents, thereby prima facie establishing the case against the drawer, the onus of proof shifts on the drawer or accused to adduce cogent material and evidence for rebutting the said presumption, and as established in *Laxmi Dyechem v. State of Gujarat*⁵, based on preponderance of probabilities.*

*20. While describing the offence envisaged under Section 138 of the NI Act, 1881 as a regulatory offence for largely being in the nature of a civil wrong with its impact confined to private parties within commercial transactions, the 3-Judge Bench in the decision of *Rangappa (supra)* highlighted Section 139 of the NI Act, 1881 to be an example of a reverse onus clause. This is done so, as the Court expounds, in the light of Parliament's intent, which can be culled out from the peculiar placing of act of dishonour of cheque in a statute having criminal overtones. The underlying object of such deliberate placement is to inject and enhance credibility of negotiable instruments. Additionally, the reverse onus clause serves as an indispensable “device to prevent undue delay in the course of litigation”. While acknowledging the test of proportionality and having laid the interpretation of Section 139 of the NI Act, 1881 hereof, it was further held that an accused cannot be obligated to rebut the said presumption through an unduly high standard of proof. This is in light of the observations laid down by a co-ordinate Bench in *Hiten P. Dalal v. Bratindranath Banerjee*⁶, whereby it was clarified that the rebuttal*



ought not to be undertaken conclusively by an accused, which is reiterated as follows:

“23. In other words, provided the facts required to form the basis of a presumption of law exist, 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’.”

Therefore, it may be said that the liability of the defence in cases under Section 138 of the NI Act, 1881 is not that of proving its case beyond reasonable doubt.

21. In light of the aforesaid discussion, and as underscored by this Court recently in the decision of Rajesh Jain v. Ajay Singh⁷, an accused may establish non-existence of a debt or liability either through conclusive evidence that the concerned cheque was not issued towards the presumed debt or liability, or through adduction of circumstantial evidence vide standard of preponderance of probabilities.



22. Since a presumption only enables the holder to show a *prima facie* case, it can only survive before a court of law subject to contrary not having been proved to the effect that a cheque or negotiable instrument was not issued for a consideration or for discharge of any existing or future debt or liability. In this backdrop, it is pertinent to make a reference to a decision of 3-Judge Bench in *Bir Singh v. Mukesh Kumar*⁸, which went on to hold that if a signature on a blank cheque stands admitted to having been inscribed voluntarily, it is sufficient to trigger a presumption under Section 139 of the NI Act, 1881, even if there is no admission to the effect of execution of entire contents in the cheque.

23. It is therefore apposite to make a reference to the provision of Section 140 of the NI Act, 1881, which ruminates *mens rea* to be immaterial while dealing with proceedings under Section 138 of the NI Act, 1881. The said legislative wisdom of the Parliament which is imbibed in the bare text of the provision is reproduced as below:

“140. Defence which may not be allowed in any prosecution under section 138—It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.”

24. Through this legal fiction adopted by the legislature vide Amendment Act of 1988 to the NI Act, 1881 it has barred the drawer of a cheque, which was dishonoured, to take a defence that at the time of issuance of the cheque in question he or she had no reason to believe that the same will be dishonoured upon being presented by the holder of such a cheque, especially and specifically for the reasons underlined



in Section 138 of the NI Act, 1881.

25. *A comprehensive reference to the Sections 118, 139 and 140 of the NI Act, 1881 gives birth to a deemed fiction which was also articulated by this Court in K.N. Beena v. Muniyappan⁹ as follows:*

“Under section 118, unless the contrary was proved, it is to be presumed that the negotiable instrument (including a cheque) had been made or drawn for consideration. Under section 139 the court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus, in complaints under section 138, the court has to presume that the cheque had been issued for a debtor's liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused. The Supreme Court in the case of Hiten P. Dalal v. Bratindranath Banerjee has also taken an identical view.”

26. *Furthermore, on the aspect of adducing evidence for rebuttal of the aforesaid statutory presumption, it is pertinent to cumulatively read the decisions of this Court in Rangappa (supra) and Rajesh Jain (supra) which would go on to clarify that accused can undoubtedly place reliance on the materials adduced by the complainant, which would include not only the complainant's version in the original complaint, but also the case in the legal or demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his Section 313 CrPC 1973 statement or at the trial as to the circumstances under which the promissory note or cheque was executed. The accused ought not to adduce any further or new evidence from his end in said circumstances to rebut the concerned statutory presumption.”*



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7. Applying the principles laid down by the Apex Court, the material on record reveals that the cheque in question has been signed by the accused. All the ingredients of Section 138 NI Act has been satisfied and therefore the presumption against the accused has arisen. The question therefore is whether the conclusion of the Trial Court after scrutiny of the evidence that the accused has raised a probable defence should be further scrutinized by grant of leave to appeal or not.

8. Material on record indicates that the case of the Complainant is that two sets of loans were advanced; one for the sum of Rs.50,000/-, for which there is an agreement and the other for the sum of Rs.5 lakh, for which there is no agreement. There is nothing to support that the sum of Rs.5 lakh was indeed given to the Respondent/accused. No witnesses have been examined, coupled with the fact that the Complainant has also not given any material to show that he has the financial capacity to advance a loan of Rs.5 lakhs. The Trial Court has carefully considered the cross-examination of the Complainant. The Complainant states that he runs a bakery shop but he does not maintain any account for the same. There is nothing to show that he does indeed run a bakery shop. It was for the Complainant to give some evidence to show that he runs a bakery shop which would have helped to substantiate that the Complainant had the capacity to advance Rs. 5 lakh.

9. The Trial Court has also recorded that Complainant in his evidence has said that he is not even an income tax payee. The daily income of the Complainant is Rs.1,000/- and that there are nine members in his family. He states that his son runs a scrap business. He states that he has a rental income of Rs.15,000-Rs.20,000/- per month and his wife earns around Rs.15,000/- per month from stitching and tailoring and therefore the Trial Court was of



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the opinion that the Complainant does not have the financial capacity to advance a loan of Rs.5 lakhs. The Trial Court was therefore of the opinion that by the facts of the case, it is improbable that the Complainant would advance loan of Rs.5 lakhs to the accused without any kind of written agreement especially when he has sufficient material to show that a loan for the sum of Rs.50,000/- was taken by the Respondent/accused.

10. The conclusion of the learned Trial Court that the cheque had been given as security for the loan advanced by the Petitioner to the Respondent for the sum of Rs.50,000/- is based on acceptable material. This Court is of the opinion that the conclusion of the Trial Court has been arrived at after scrutinizing all the material before it. It cannot be said that the conclusion arrived at by the Trial Court is so perverse or improbable that the judgment would have to be reversed in the appeal. The view taken by the Trial Court is a plausible view. This Court is therefore not inclined to grant leave to appeal to the Petitioner.

11. The petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

AUGUST 28, 2024

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