2023:DHC:7604

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

% ***Reserved on: 14.09.2023***
Pronounced on: 17.10.2023

\+ **CRL.REV.P. 875/2018 & CRL.M.(BAIL) 1599/2018**

SATYA PAL DHAWAN ..... Petitioner

Through: Petitioner-in-person

versus

ANIL KUMAR ..... Respondent

Through: Ms. Sampanna Pani, Mr. Prashant Tripathi, Advocates with Mr. Sudesh Pal (AR)

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition under Section 397 read with Section 401/482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of petitioner seeking setting aside of judgment dated 12.09.2018 passed by learned Additional Sessions Judge-02, (East), Karkardooma, Delhi whereby the Criminal Appeal No. 38/2018 filed by the petitioner was dismissed.

2. In the present case, the petitioner *vide* judgment dated 09.03.2018 was convicted for offence under Section 138 of Negotiable Instruments Act, 1881 ('NI Act') by learned Metropolitan

Magistrate, Karkardooma, Delhi ('learned MM') in CC No. 52659/2016 titled "Anil Kumar vs. Satya Pal Dhawan". Further, vide order on sentence dated 13.09.2018, the petitioner was sentenced to undergo imprisonment for three months and fine of Rs. 2,60,000/- out of which, Rs. 2,40,000/- is payable to the complainant as compensation and remaining amount of Rs. 20,000/- is to be deposited with State by the convict and in default of payment of same, convict will suffer further simple imprisonment of two months.

3. Briefly stated, the facts of the present case as per the case of complainant are that the complainant used to have friendly relation with the accused/petitioner and the accused had requested to arrange a sum of Rs. 1,50,000/- as friendly loan since he was in dire need of money. Accordingly, the complainant had advanced a friendly loan of the said amount in cash to the accused. It was also alleged that the accused in order to discharge his liability towards the complainant had issued cheque bearing no. 894375 dated 10.10.2011 for an amount of Rs. 1,50,000/-. When the complainant had presented the said cheque, it had been returned dishonoured with remark 'funds insufficient' *vide* cheque return memo dated 13.01.2012. The complainant had then conveyed the same to the petitioner vide legal demand notice dated 10.02.2012. The accused had failed to pay the demanded amount within stipulated period despite service of statutory demand notice. Thereafter, the complainant had filed the present complaint case before the learned MM.

4. During the course of trial, complainant had got himself examined as CW1, and the evidence of complainant taken on

affidavit at pre-summoning stage was tendered during the trial. He had also proved the other documents such as his affidavit, the cheques in question and their return memos, the legal notice issued to the petitioner as well as the postal receipts of the same.

5. Statement of accused/petitioner was recorded under Section 313 of Cr.P.C. whereby he had admitted the signing and filling the entire contents of the cheque in question and had also stated that he had taken an amount of Rs. 1,50,000/- from the complainant. He had further stated that since the complainant had to get an ATM installed at his shop, accused had returned the said amount in cash after selling his flat in Mandawali. It was also stated that the complainant had not returned his cheque even after the liability was discharged.

6. After hearing the final arguments and appreciating the evidence on record, the petitioner herein was convicted under Section 138 of NI Act by virtue of judgment dated 09.03.2018. The operative part of the said judgment reads as under:

> "…7. Coming to the appreciation of testimony of witnesses in the case, it is clear that accused has taken Rs. 1.5 lacs from the complainant and he had given cheque in question after filling the entire contents of the same. During cross examination of CW1, accused had taken plea that mpbile tower was to be installed in the building of the complainant for which, he had taken said Amount from the complainant. However, in his testimony, accused had stated that he had taken said money from the complainant as advance for installation of an. ATM at his premises. Further, accused did not file any document for, proving installation of either mobile tower or ATM at the premises of complainant . It is also noteworthy that accused did not file any receipt or any independent witness for proving alleged repayment of said amount to the complainant. It is further noticeable that the accused did not take any action against complainant for not returning the cheque in question despite alleged repayment whereas a reasonable person is expected at least to instruct his bank not to pay any amount on basis of the disputed cheque.

> 8. Having gone through the testimony of witnesses and thq material available on the record and also considering the rival submissions of both side, this court is of considered view ttiat accused has failed to rebut the legal presumption of legally enforceable debt or liability, in favour of holder of cheque i.e. complainant of the case u/s 139 of Nl Act. Accordingly, accused is convicted for the offence u./s' 138 of the Nl Act in the present complaint case…"

7. Further, the operative portion of order on sentence dated 13.03.2018 reads as under:

> "…In view of above said submissions of Ld. Counsel for the convict and the facts and circumstances of case in hand, commercial nature of transaction in question between the parties and legislative intent' behind making dishonouring of cheque a criminal offence as to deter the casual drawer of cheque and ensuring smooth commercial transactions, through cheque and also the mental agony faced by the complainant in pursuing present case since 2012, the convict is sentenced to suffer imprisonment for 3 months and fine of Rs. 2,60,000/- out of which Rs. 2,40,000/- is payable to the complainant as compensation and remaining amount of Rs. 20,000/- is to be deposited with State by the convict. In case of default in payment of fine, the convict will suffer further simple imprisonment of two months. In .default of payment of fine ordered to be paid, by the convict, complainant is reminded to get the same recovered under section 421 read with431 of Cr.P.C…"

8. Aggrieved by the decision of the learned MM, the petitioner had preferred an appeal before the learned ASJ, who was pleased to dismiss the appeal, thereby upholding the judgment and order on sentence passed by the learned MM. The concluding portion of impugned judgment dated 26.09.2018 passed by learned ASJ reads as under:

> "…5. Appellant had taken friendly loan of Rs. 1,50,000/- from the respondent in the year 2011 and issued cheque in discharge of his liability which dishonoured on presentation. Thus, period of about 7 years has passed but the appellant has failed to repay the said loan amount. The appellant is facing trial since the year 2012. He has has not deposited any amount qua fine/compensation imposed by the Ld. Trial Court. Appellant has been convicted for the offence u/s 138 NI

> Act and vide order dated 13.03.2018, he was sentenced to suffer imprisonment for three months and fine of Rs.2,60,000/- out of which Rs.2,40,000/- was payable to the complainant as compensation and remaining amount of Rs.20,000/- was to be deposited with State and in default of payment of fine, the appellant was to suffer further SI for two months. Considering the facts and circumstance of the case, in my view, Ld.Trial Court has awarded appropriate sentence to the appellant. The order on sentence dated 13.03.2018 passed by Ld. Trial. Court needs no modification. Thus, the same is also upheld.
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> 6. Appellant is directed to surrender before the Ld. Trial Court on 05.10.2018…"

6. Aggrieved by aforesaid decisions passed by both learned MM and learned ASJ, the present revision petition has been preferred by the petitioner.

7. Learned counsel for the petitioner argues that both the courts below have failed to appreciate that there did not exist any legally enforceable debt or liability in favour of complainant. Further, the cheque in question was never given against discharge of such liability and the same was misused by the complainant. It is stated that neither any loan agreement nor any receipt was executed in relation of the said loan amount. It is further argued that the amount taken by the petitioner was returned after selling property of the wife of the petitioner. Learned counsel for the petitioner further argues that in order to attract Section 138 of NI Act the debt or liability has to be legally recoverable, which in the present case is not reflected since the petitioner had already returned the said amount. Thus, it is prayed that the impugned judgment be set aside and petitioner be acquitted in the present case.

8. *Per contra*, learned counsel for respondent/complainant argues that the learned MM and learned ASJ have passed comprehensive

judgments covering each and every aspect of the defence of petitioner and after thoroughly examining the evidence on record, and they have rightly convicted the petitioner for the offence under Section 138 of NI Act. It is stated that the complainant has supported his case when he was examined. It is further argued that the accused himself has accepted that the signatures and particulars on the cheque were filled by him and that he had borrowed money from the complainant. It is further stated that the contention of the petitioner that he had returned the money of the complainant is not supported by any material evidence and the same cannot be taken as a ground to discharge him from his liability towards the complainant.

9. This Court has heard arguments addressed by learned counsel for the petitioner and learned counsel for the respondent and had perused the Trial Court Record and judgments passed by both the learned MM and learned ASJ, in addition to the material on record.

10. Since, the present revision petition has been filed under Section 397 read with 401/482 of Cr.P.C. in essence assailing concurrent findings of both the courts below, this Court is only required to assess the correctness, legality or propriety of the impugned judgment.

11. The issues in the present case that has been pointed out by the learned counsel for the petitioner are summed up as under:

i. The legally enforceable debt or liability in favour of the complainant did not exist as the petitioner had already paid the amount he had taken from the complainant.

ii. The amount taken from the complainant was in cash and was returned in cash by the petitioner, which was in respect of installation of an ATM shop at the shop of the complainant. However, the complainant had not returned the cheque issued by the petitioner even on payment of the loan amount.

12. Having perused the Trial Court Record and the judgments passed by both learned MM and learned ASJ, this Court is of the opinion that both the courts have dealt with the aforesaid contentions of the petitioner in detail and have returned their findings on the same.

13. This Court, at the outset, notes that the petitioner had accepted that the cheques had been signed by him and drawn on his bank account. To this effect, the Hon'ble Supreme Court in ***Bir Singh v. Mukesh Kumar****(2019) 4 SCC 197*, has observed as under:

> "33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, **makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability**. **It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer.** If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.
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> 34. **If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque.** The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.
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> 35. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the

> case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.
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> 36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."
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> (Emphasis supplied)

14. Furthermore, as rightly held by the learned MM, when the signatures on the cheques had 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. The law on this preposition is well-settled and for the same, a reference can be made to the decision 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:
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> 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**.
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> 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.
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> 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."
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> (Emphasis supplied)

15. Thus, the contention of the petitioner that there was no legally recoverable debt has to be supported by material evidence in order to rebut the presumption that the cheques in question had been issued by the petitioner towards some legally enforceable debt.

16. With regard to the contention raised by the learned counsel for the petitioner that he had returned the said amount to the complainant after disposing of his property cannot be taken to be true in substances since no material evidence has been presented to corroborate the same. It has been rightly noted by learned Trial Court that the accused has simply stated that he had returned the said amount to the complainant, however, he has not given any particulars of the payment allegedly made by him. He has neither mentioned any date nor any time when he had returned the said amount. It was stated by the accused/petitioner during his cross-examination that he had returned the said amount in the presence of 2-3 persons but he has not mentioned the names of those persons. Thus, this Court notes that this plea is not maintainable as it lacks the support of any material evidence.

17. This Court notes that the complainant during his cross-examination before the learned Trial Court had stated that he had known the accused since 2008 and they were having visiting terms. It was also stated that the complainant had borrowed Rs. 70,000/- from his brother and Rs. 30,000/- from his uncle and remaining was withdrawn by him from his bank account in addition to Rs. 30,000/- that he had earned from his general store. He had also stated that he had no previous transaction with the accused and that he had advanced the said loan amount without any interest.

18. This Court while perusing the statement of the wife of the petitioner who deposed as DW2 notes that the petitioner had given the cheque to the complainant at the time of taking money from him. The learned ASJ had thus rightly observed that though both the parties were known to each other yet complainant had ensured the safety of his amount by taking a security cheque. It would be incorrect to assume in the given circumstances that the petitioner would have returned the said amount without ensuring return of his cheque.

19. This Court further notes that the complainant had served a legal notice to the present petitioner calling for the discharge of his liability after the cheques had returned as dishonoured. In this regard, it is pertinent to note that the petitioner had also admitted that he had received the legal notice and had not replied to the same. The petitioner had thus failed to rebut the claim of the complainant and had not sought the return of cheque, even when he considered it to be false. It is noted that the issuance of cheque is a serious business and

if a cheuqe has not been issued in discharge of legally enforceable debt then the accused is supposed to take appropriate action seeking return of his cheque. If the accused fails to establish reason for issuance of cheque and as to why he did not seek the return of the cheque then it is to be assumed that he has failed to rebut the presumption. In the present case, the accused has failed to take any action seeking return of the cheque either prior to service of legal notice or after the service of legal notice. Thus, the plea taken by the accused that the cheque in question is without any legally enforceable debt is not maintainable.

20. This Court observes that both courts below had rightly noted that in case the accused takes the plea that he had repaid the amount, the entire onus was on the accused to establish that he had repaid the amount to the accused. This Court notes that no cogent evidence has been presented by the petitioner to discharge this onus. Resultantly, the presumption of Section 139 of NI Act remained unrebutted and accordingly it is to be presumed that the accused had issued the cheque in question qua the repayment of amount of Rs. 1,50,000/- as claimed by the complainant.

21. In view of the aforesaid discussions, this Court notes that the petitioner has failed to establish any infirmity in the judgment passed by the learned ASJ *vide* which the conviction of the petitioner under Section 138 of NI Act as recorded by learned MM was affirmed.

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

23. The petitioner is hereby directed to pay the remaining amount of fine/compensation as awarded by the learned MM and surrender within 15 days before the learned Trial Court concerned to serve the substantive sentence as awarded to him *vide* order dated 13.03.2018.

24. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

OCTOBER 17, 2023/zp