
(2007) 12 DEL CK 0114

In the Delhi High Court

Case No : Criminal Appeal No's. 771, 772 and 773 of 2007 and Criminal M.A. No's. 3111, 3113 and 3115 of 2007

Birender Singh

APPELLANT

Vs

State (NCT of Delhi) and Another

RESPONDENT

Date of Decision : 05-12-2007

Acts Referred:

Evidence Act, 1872 — Section 114

Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2008) 1 BC 452

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Sima Gulati, for the Appellant; Manoj Ohir and Amit Sharma, Assistant Public Prosecutor for Respondent No. 1 and M.S. Sasan, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—By this common judgment, I shall dispose of these three appeals against the three judgments all dated 8th March, 2007 against the common respondent in complaint cases filed by the three appellants u/s 138 of Negotiable Instruments Act (in short NI Act). All the three appeals have similar facts and give rise to same question of law. In all the three appeals, the complainants/appellants filed complaint against respondent No. 2 u/s 138 of NI Act alleging that respondent No. 2 had issued cheques in discharge of loan liability and all these cheques got dishonoured. No payment was made despite notice u/s 138 of NI Act and hence the complaint was filed. The accused/respondent No. 2 (hereinafter as respondent) took a common stand in all three cases that he had no privity of contract with any of the complainants at any stage of time. The cheques which were subject matter of the complaint were given to the employee of Mr. Nalin Tokas, who used to collect the cheques on account of Chit Fund floated by Mr. Nalin Tokas in the name of Classical Star Chit Fund Private Limited. Signed cheques were given in advance to ensure the

payment of monthly chit amount by the respondent. The respondent on each cheque had mentioned "Not to exceed Rs. 10,000/-" since the chit Installment was below Rs. 10,000/-. Mr. Nalin Tokas had taken 20 cheques from the respondent when respondent became member of the Chit Fund. However, during the continuation of Chit Fund a dispute arose between Mr. Nalin Tokas and the respondent about which a complaint was lodged by respondent to DCP (Vigilance) on 12.10.2003 and 21.10.2003. The respondent had alleged that despite receiving payment of monthly chit amount, cheques were not returned by Nalin Tokas and his employees assuring that the cheques would be destroyed. Complainant blamed that the blank cheques were misused by Mr. Nalin Tokas by putting the blank cheques in the accounts of his different employees and the complaints were filed making the employees as shield. The respondent had also filed an FIR with the police in respect of misuse of his cheques.

2. A perusal of record would show that in all three cases, notices were served upon the respondent by the same Advocate about dishonour of the cheques and in all three notices the same plea was taken that the respondent had taken loan in cash and had issued cheques. However, in none of the three cases, the cheques amount was equivalent to the loan amount. In Crl. Appeal No. 771/2007 while cheque amount was Rs. 19,800/- the loan amount was shown as Rs. 20,000/-. In Crl. Appeal No. 772/2007, the loan amount was alleged to be Rs. 30,000/- and the cheques amount was Rs. 29,200/-. In Crl. Appeal No. 773/2007 the loan amount was stated to be Rs. 15,000/- while cheque amount was Rs. 15,700/-. The learned Metropolitan Magistrate observed that from the testimony of complainant and cross-examination of complainant, it was apparent that there were deviations in the evidence of each case from the facts stated in the complaint. In Crl. Appeal No. 771/2007, the complainant stated in the complaint that cheques were issued for lesser amount and it was assured that remaining amount of Rs. 200/- would be paid later on. During evidence the complainant changed the stand and stated that the amount of Rs. 200/- was paid in cash and cheques for Rs. 19,800/- were issued. In Appeal No. 772/2007, the complainant initially stated that cheques were issued to him with amount filled in at the bus stand but during his cross-examination, he stated that the cheques were not issued with filled-in amount but only with an endorsement that cheques would be not more than Rs. 10,000/- was there and the accused later on after reaching home telephoned him that such and such amount and date be filled in the cheques. He also could not explain why the cheques were not of the exact loan amount and were of lesser amount than the loan amount by Rs. 800/-. In Crl. Appeal No. 773/2007, the complainant could not explain as to why the respondent issued cheques of more amount than the loan amount.

3. It has also come in evidence that each of the complainants named as accused in the FIR lodged by the respondent and in search of house of Mr. Nalin Tokas photo-copies of legal notices served on the respondent were recovered along with copies of cheques. This created serious doubts at the truthfulness of the complainant's story of respondent issuing cheques against the loan amount. Trial

Court concluded that the respondent was not supposed to prove his defense beyond reasonable doubt and the presumption created under Sections 139/118 of Negotiable Instruments Act need not be rebutted by direct evidence to be adduced by the accused and the accused can rely upon the cross examination of complainant to rebut the presumption.

4. It is argued by the Counsel for the appellants that the trial Court wrongly held that the accused need not rebut the presumption by direct evidence and could disprove the case without holding evidence. The appellant relied upon *Hiten P. Dalal Vs. Bratindranath Banerjee*, , *Hiten P. Dalai v. Bratindranath Banerjee* wherein Supreme Court observed as under:

23. Judicial statements have differed as to the quantum of rebutting evidence required. In *Kundan Lal Rallaram Vs. Custodian, Evacuee Property, Bombay*, this Court held that the presumption of law u/s 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised u/s 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in *Dhanvantrai Balwantrai Desai Vs. State of Maharashtra*, , where this Court reiterated the principle enunciated and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an Explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised u/s 114 of the Evidence Act and cannot be held to be discharged merely be reason of the fact that the Explanation offered by the accused is reasonable and probable. It must further be shown that the Explanation is a true one. The words "unless the contrary is proved" which occur in this provision make it clear that the presumption has to be rebutted by "proof and not by a bare Explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, if the Explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....

5. There is no doubt that the burden rests on the accused to rebut the presumption as raised under Sections 139 and 118 of the Negotiable Instruments Act. However, this presumption can be rebutted by the accused not merely by examining his own witnesses but even by cross-examination of the complainant and his witnesses and bringing out on record, through cross-examination, that the complainant was altar and there was no privity of contract between the complainant and the accused and cheques were misused. It must be kept in mind that once evidence is brought on record from both the sides, it is evidence

of the case and Court can draw inference from the evidence in favor or against either of the parties. Evidence is a complainant's evidence and accused's evidence for the purpose of identifying it, but once it is adduced in the case, it is evidence in the case and evidence has to be read as a whole. The Court cannot read the evidence of the complainant only to the extent it favors the complainant and overlook the rest of the evidence which supports accused case on the ground that it is the complainant's evidence. Similarly, from the evidence adduced by the accused, the Court can draw inference in the favor of the complainant. The accused has a right to argue his case even on the basis of complainant's cross-examination and show to the Court that the presumption in favor of the complainant stands rebutted from its own evidence.

6. In the present case, the accused successfully showed that all the cheques were issued with an endorsement to be below of Rs. 10,000/-. Such an endorsement was not required to be made by the accused if he had issued cheques to different complainants, for repayment of loan, which was in all cases above Rs. 10,000/-. There would have been no necessity for accused to issue 02 or 03 cheques of almost same amount in discharge of the loans to the complainants in same pattern, the accused could have issued one single cheque in discharge of respective amounts. The other fact which goes in favor of the accused is that in all the three cases same Advocate issued notice to the respondent taking similar plea of friendly loan and in the same manner and the loan amount and cheques amount was different. All this fortifies the case of the respondent that all these cheques were those cheques which were given by the respondent for Chit Fund Company and misused by the employees of the Chit Fund Company at the instance of the Director or owner of the Chit Fund Company to show personal loans. If the complainants had come up to the Court with clean hands stating that the cheques with filled-in amount were endorsed in their favor by the Chit Fund Company, the case would have been different but all the three complainants had come to the Court with unclean hands, their testimony itself failed them. Their inability to explain during cross-examination various facts was enough to rebut the presumption raised against the accused.

6.1 The trial Court rightly came to the conclusion that there was no privity of contract and the cheques were not issued to the appellants against any loan liability. I find no force in the appeals, the appeals are hereby dismissed.