

(2017) 08 DEL CK 0014

In the Delhi High Court

Case No : 500 of 2014

SAJIDUR REHMAN

APPELLANT

Vs

RAJIV KASHYAP & ANR

RESPONDENT

Date of Decision : 04-08-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 251](#) - Power to examine the accused - Substance of accusation to be stated
[Negotiable Instruments Act, 1881](#), [Section 138](#)

Citation : (2017) 08 DEL CK 0014

Hon'ble Judges : Ashutosh Kumar

Bench : SINGLE BENCH

Advocate : Anshuman Animesh, Sakshi Kaushik, Anuj Kr.Ranjan, Neelam Sharma

Judgement

1. Sajidur Rehman, the petitioner, has been convicted under Section 138 of Negotiable Instruments Act, 1881 vide judgment and order dated 24.11.2011 and 28.11.2011 respectively, passed by the learned Metropolitan Magistrate, Karkardooma Courts, Delhi in connection with CC No.7628/2010 and has been sentenced to undergo RI for a period of 8 months and to pay a compensation of Rs.22,20,000/- to the respondent/complainant within a period of one month from the date of passing of the order and on failure to do so, to undergo SI for a further period of 6 months.
2. The petitioner, thereafter, unsuccessfully appealed before the ASJ-02 (East), Karkardooma Courts vide Crl. Appeal No.57/2012. The Appellate Court did not find any merit in his appeal and dismissed the same.
3. The present revision petition assails both the judgments by the courts below.
4. A complaint was filed by the respondent alleging that he was known to the petitioner who had approached him for financial help of Rs.20 lakhs for 10 days. On such demand by the petitioner, it was further alleged that a sum of Rs.17,20,000/- was paid to him in the month of April, 2008 against an oral

agreement. In discharge of such liability, the petitioner is said to have issued two post dated cheques on 03.04.2008 in the name of the respondent; one of 05.04.2008 (Cheque No.432458, drawn on HDFC Bank Ltd. Guwahati, Assam for an amount of Rs.7,20,000/-) and the other of 08.04.2008, (Cheque No.432457 drawn on the same bank for an amount of Rs.10 lakhs), with a caveat that those cheques would not be presented in the bank till 22.05.2008. The aforesaid cheques were presented for encashment and they were returned unpaid vide memo dated 24.05.2008. For one cheque of Rs.7,20,000/-, there was an instruction to stop payment and for the other cheque of Rs.10 lakhs, the bank reported that there was alteration and therefore the same was referred to the drawer.

5. A legal demand notice dated 09.06.2008 was issued to the petitioner but it was not acted upon and hence the complaint under Section 138 of the Negotiable Instruments Act, 1881 was filed on 14.07.2008 leading to the registration of Complaint Case No.7628/2010.

6. The petitioner pursuant to the notice under Section 251 of the Cr.P.C. pleaded not guilty and claimed to be tried.

7. At the trial, the respondent examined himself as CW1 and adopted the affidavit which was filed by him at the pre-summoning stage. Thereafter, the petitioner filed an application under Section 145 (2) of the Negotiable Instruments Act, 1881 seeking permission to cross-examine the respondent.

8. The respondent was cross-examined and then the statement of the petitioner was recorded under Section 313 of the Cr.P.C. On behalf of the petitioner, he himself got examined as DW1 and filed one money receipt cum agreement to sell (Mark D1).

9. The Trial Court convicted the petitioner after holding that the cheques were issued by him and that those were in discharge of the debt which the petitioner owed to the respondent. The Trial Court was of the view that the petitioner could not rebut the presumption as contemplated under Section 118B and Section 139 of the Negotiable Instruments Act, 1881.

10. The Trial Court held that it was for the petitioner to prove that no loan was taken and that he should have asked the respondent for return of the cheques. The defence of the petitioner that he had issued cheques to the respondent at the instance of one Anil Shandilya was not accepted. The Trial Court though, took note of the discrepancies in the statement of the respondent and the documents produced by him viz. his ITRs for the relevant years but did not give any benefit of doubt to the petitioner and convicted him for the offence under Section 138 of the Negotiable Instruments Act, 1881.

11. The Appellate Court by its judgment dated 03.03.2014 affirmed the conviction/sentence as also the reasoning given by the Trial Court for accepting the version of the respondent and dismissing the case of the petitioner.

12. Learned counsel appearing for the petitioner has drawn the attention of this court to the fact that the respondent/complainant though, admitted that he knew Anil Shandilya but has not spoken about him either in his complaint or in his evidence. Another aspect which was dwelled by the petitioner was the document adduced on his behalf (Mark D1) which is a "money receipt cum agreement to sell", which was executed between the petitioner and one Madan Verma. The case of the petitioner is that such an agreement was entered into through the agency of one Anil Shandilya who brokered the agreement for purchase of property bearing No.N-27, First Floor, South Extension, Part-I for a total consideration amount of Rs.72 lakhs. The aforesaid agreement which is also in the nature of a money receipt indicates that advance/part payment was made vide two cheque Nos.432458 and 432457 for the amount of Rs.7,20,000/- and Rs.10 lakhs respectively which was accepted by the respondent, Rajiv Kashyap. The petitioner had made out a case that he had given those cheques in question to the broker, Anil Shandilya and at his instance the cheque was drawn in favour of the respondent who was an associate of aforesaid Anil Shandilya. The further case of the petitioner is that the deal for purchase did not finalize and therefore the petitioners demanded his cheques back. He was made to understand by aforesaid Anil Shandilya that those cheques were destroyed.

13. Learned counsel for the petitioner, therefore, has submitted that it is a strange coincidence that the cheques which have been presented by the respondent as having been given by the petitioner in discharge of his debt towards respondent are of the same number and denomination which finds mention in the "agreement to sell cum money receipt" (Mark D1)". It also appears rather strange that on a demand of Rs.20 lakhs by the petitioner for his needs, a peculiar amount of Rs.17,20,000/- was given by the respondent.

14. It has next been contended on behalf of the petitioner that the respondent in his deposition has clearly stated that he is not in the property dealing business but in his IT Return of 2008-2009 (Mark A), he has shown that he is carrying on business of property brokerage and labour-contract. Apart from this, attention was drawn to the statement made by the respondent before the court that he is in the business of getting the work of painting and polishing of furniture done, and that he had been earning an amount of Rs.18,000/- per month. He has claimed to be an IT assessee but none of his returns show any substantial income for proving his solvency to lend credence to his version that he had advanced a loan of Rs.17,20,000/-. It has also been argued that if at all the respondent had given such big amount as loan, the same ought to have been shown in his IT Returns.

15. The amount of Rs.17,20,000/- is said to have been paid in cash to the petitioner without any details regarding the denomination of the notes. The passbook of the respondent (Ex.CW1/G) reveals that on 03.04.2008, there was a withdrawal of Rs.24 lakhs and shortly thereafter the same amount was deposited back. The loan is said to have been given on 03.04.2008. Thus, it is submitted

that the respondent failed to prove that the sum which was withdrawn by him from his bank was given to anybody, much less the petitioner.

16. The learned counsel for the petitioner has taken other grounds but the same are not required to be discussed as they do not have any substance.

17. On the other hand, learned counsel appearing for the respondent has argued that all the ingredients of Section 138 of NI Act have been met and satisfied. There is a clear and unambiguous assertion of the respondent that on the demand of the petitioner, Rs.17,20,000/- was given in cash. In discharge of the aforesaid liability of the petitioner, two cheques were drawn in the name of the respondent, which were dishonoured. It has further been submitted on behalf of the respondent that even if one of the cheques was returned because of alteration, that also would fall within the genus of "dishonour" of cheque, making the petitioner liable to be prosecuted under Section 138 of Negotiable Instruments Act. The "agreement to sell cum receipt" brought on record by the petitioner is not a document which could be relied upon. The notice regarding dishonor of cheques was promptly sent to the petitioner and it was wrong for the petitioner to contend that such notice was not received by him.

18. A bare perusal of the Trial Court judgment reveals that the contradiction in the statement of the respondent as well as the documents produced by him were noted by the learned Trial Court but were not given any weightage; rather the Trial Court relied upon the fact that the petitioner himself accepted in his cross-examination that he had taken overdraft from Vijaya Bank and was under some liability to pay back such amount and that if at all the petitioner would have brought Anil Shandilya or Madan Verma as defence witnesses, such assertion of the petitioner could have had some probative value. Similar view has been taken by the learned Appellate Court.

19. With regard to the contentions of the petitioner that he had no transaction at all with the respondent directly and the respondent did not have the capacity to pay, the Appellate Court has held hereunder:- "6. The appellant in this matter has asserted that he had no transaction whatsoever with the complainant directly. He had entered into a property transaction with Anil Shandilya and on his say had given the cheque for the said property transaction to the complainant. He challenged the capacity of the complainant to pay a huge amount of money as a loan to the appellant. The complainant in his cross-examination admitted his income during the year 200809, and 200910 was Rs.1,51,585/and Rs.2,34,668.35/. In the year 201011, his gross income was Rs.3,19,398.25/. The complainant admitted that he was a 25 years of old boy who was living in the house of Anil Shandilya, who is his distant relative. In support of his claim that he had the capacity to pay the money, he brought on record his bank passbook. This document Ex.PW1/G shows entry of Rs.24 Lakhs being withdrawn from the account of complainant on 03/4/2008. The complainant asserted that this amount of Rs.24 lakhs was withdrawn from his account to pay the loan to the appellant. No question was put to the witness on

from where did this money came in his account.

The complainant thus, proved that on the date of incident he had Rs. 24 lacs out of which the loan of specified amount was given to the accused. Ex. PW 1/G is a bank document and the argument of Ld. Counsel that the entries in it are manipulated cannot sustain. Whether or not the complainant had the capacity to pay such a huge amount to the appellant in view of his ITR, is not a question to be decided in the proceeding u/s 138 NI Act when the complainant has proved that he had Rs. 24 lacs with him on the date of incident."

20. The Appellate Court has not taken into account the "money receipt cum agreement" (Mark D1) as it was only a photocopy of the agreement. With respect to the aforesaid document, the Appellate Court subscribes the following reasons for holding that the petitioner has not been able to rebut the presumption under Section 139 of Negotiable Instruments Act, 1881:- "8. In support of his contention that some property transaction was entered into between him and Anil Shandilya, the appellant had brought on record a money receipt cum agreement. This document was never proved as only photocopy of the agreement was filed on record. The appellant did not even seek the permission of the court to allow this document to be accepted as a secondary evidence. The document has not been proved as per the Indian Evidence Act at all and cannot be accepted against the complainant even for the purposes of rebuttal of presumption. The document in any case is not in the name of either the complainant or alleged Anil Shandilya. The appellant therefore has failed to rebut the presumption regarding the consideration as laid down u/s 139 NI Act."

21. It would be necessary to refer to the relevant provisions of the Negotiable Instruments Act for appreciating the contentions of the parties. 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, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration; ...

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 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 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.

22. With regard to the nature of presumption contemplated in Section 139 of the Negotiable Instruments Act, the Supreme Court in Rangappa vs. Sri Mohan: (2010) 11 SCC 441 has held as follows: "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.

23. The following facts, namely: (i) no definite proof of the relationship between the petitioner and the respondent; (ii) no conclusive proof of the financial strength of the respondent to pay a loan of Rs.17,20,000/- to the petitioner; (iii) ITR returns not showing such transactions which could affirm the financial health of the respondent/complainant; (iv) amount of Rs.24 lakhs having been withdrawn from the account of the respondent and the same amount having been deposited immediately in the same account; (v) "agreement to sell cum money receipt" between the petitioner and a third party, namely, Madan Verma; (vi) the same document having an endorsement regarding two cheques, the number of which tallies with the cheque referred by the respondent/complainant and the assertion of the petitioner that the agreement to sell was entered into between him and one Madan Verma which was brokered by one Anil Shandilya and an advance payment was made to Anil Shandilya, at his instance, by way of drawing a cheque in favour of the respondent; and (vii) rebuttal/explanation regarding the existence of such a document, namely, the "agreement to sell cum money receipt" but only a slender opposition of it being a photocopy which could not have been relied upon, if taken/read cumulatively, go a long way in rebutting the presumption of the payment being made against a legally existing/enforceable debt.

24. The absence of any evidence to show the solvency of the respondent for him to have advanced loan to the petitioner leads to the presumption that there was no existing debt.

25. There is no documentary evidence to show that such a huge amount of loan was advanced to the petitioner.

26. It is difficult to accept the proposition that such amount of loan would be paid on oral agreement.

27. Both the courts below, therefore, have erred in holding that the petitioner could not rebut the presumption as contemplated under Section 139 of Negotiable Instruments Act, 1881.

28. For the reasons aforesaid, this revision petition is allowed and the judgment of conviction by the Trial Court dated 24.11.2011 and its affirmation by the Appellate Court vide judgment dated 03.03.2014 are set aside and the petitioner is acquitted of the charge.

29. Whatever amount has been deposited by the petitioner under the orders of this court in this case with the Registrar General shall be returned to him on his applying for the same before the Registrar General after a period of two months from today. The aforesaid time has been given for the purposes of giving opportunity to the respondent to challenge the present order before the superior Court.

30. The revision petition is allowed.