Delhi High Court V.S.Yadav vs Reena on 21 September, 2010 Author: Shiv Narayan Dhingra * IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: 13th September, 2010
Date of Order: 21st September, 2010

+CRL. A. NO.1136 OF 2010, % 21.09.2010

V.S. YADAV ... Petitioner Through: Mr. Puneet Mittal, Advocate.

Versus

REENA ... Respondents Through: Mr Meher Singh, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT 1. This appeal has been preferred against the judgment of acquittal passed by learned Metropolitan Magistrate (MM) acquitting the respondent/ accused of the offence under Section 138 of Negotiable Instrument Act ('N.I. Act' for short) on the ground that the complainant had failed to prove that the cheques were issued by the respondent against a liability i.e. refund of loan. 2. The brief facts relevant for the purpose of deciding this appeal are that three cheques dated 27th September, 2006, 4th October, 2006, and 6th October, 2006 for amounts of Rs. 1,25,000/-, Rs. 50,000/- and Rs. 50,000/- respectively, issued by the respondent got dishonoured and the appellant filed a complaint under Section 138 of N.I. Act against the respondent after service of a Notice of Demand as the respondent failed to pay the amount despite notice of demand. Notice under Section 251 Cr. P.C. was served upon the respondent, the respondent took no specific defence and only pleaded not guilty. The appellant by way of an affidavit led his own evidence testifying that cheques were issued to him after he had advanced loan of Rs. 2.25 lakh to the respondent. The dishonour memo of the cheques was proved by the bank official. No defence evidence was produced by the accused. 3. The appellant had taken a stand that no reply to the notice of legal demand was sent by the respondent, instead, envelopes with blank sheets in it were sent by the respondent. In her examination under Section 281 Cr. P.C. she did not deny issuance of cheques, but, took a defence that cheque were issued as security for seeking loan but no loan was advanced and the cheques were therefore without consideration. The learned MM observed that conviction under Section 138 of N.I. Act cannot be made acting on evidence

of complainant and considering the presumption under Section 139 of N.I. Act. The complainant has to prove beyond reasonable doubt the debt or liability of the accused. Learned MM observed that complainant had not specified the date of giving loan and a reasonable man would remember the date of giving substantial sum of money as loan to other and this blissful forgetness of the date by the complainant raised doubt about the liability of the accused, more so, in view of the stand taken by the accused that the cheques were issued as security and the same were never returned. 4. It must be remembered that reasoning for appreciating evidence does not mean that reasoning bereft of logic. Reasoning also does not mean mis- reasoning. All reasoning must stand the test of basic logic of a judicial mind showing that the judge had knowledge of law and had appreciated facts in the light of law. Section 6 of N.I. Act defines Cheque as under: "A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form" A bare definition of cheque shows that cheque is a Bill of Exchange drawn on specified banker and is an order by drawer on his own agent i.e. bank for payment of certain sum of money to the bearer or the order to person in whose favour cheque is drawn. This order of payment by person to the holder of cheque is not made in casual manner just for the sake of fun. This order is made for consideration and that is why Section 139 of the N.I. Act provides that the holder of a cheque is presumed to have received the cheque in discharge of whole or in part of a debt or liability. It was sufficient for complainant to prove the debt and liability by making a statement that the cheques were issued by the respondent for payment of debt. Merely because the complainant did not remember the exact date and stated that the loan was taken from him about a week before 23rd /24th June, 2006, would not throw doubt on the testimony of the complainant, more so, when the complainant specifically testified that the accused and her husband were having business in the name of S.K. Enterprises, situated at RZ-133/213 and he was approached for a friendly loan by the accused/respondent through her husband. The cross examination of this witness further shows that it was in the knowledge of accused that the complainant used to grant loan to needy persons and the accused himself cited 3 or 4 examples where the complainant had given loans to the persons. In fact, cross examination of complainant proved unequivocally that the appellant/complainant had advanced loan to respondent also. Whether the complainant was having a license for giving loans or not, was not the subject matter of the inquiry before the learned MM as it was not the defence of the respondent that loan was advanced without license. 5. It must be borne in mind that the statement of accused under Section 281 Cr. P.C. or under Section 313 Cr. P.C. is not the evidence of the accused and it cannot be read as part of evidence. The accused has an option to examine himself as a witness. Where the accused does not examine himself as a witness, his statement under Section 281 Cr. P.C. or 313 Cr. P.C. cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused was truthful. In the present case, the accused in his statement

stated that he had given cheques as security. If the accused wanted to prove this, he was supposed to appear in the witness box and testify and get himself subjected to cross examination. His explanation that he had the cheques as security for taking loan from the complainant but no loan was given should not have been considered by the Trial Court as his evidence and this was liable to be rejected since the accused did not appear in the witness box to dispel the presumption that the cheques were issued as security. Mere suggestion to the witness that cheques were issued as security or mere explanation given in the statement of accused under Section 281 Cr. P.C., that the cheques were issued as security, does not amount to proof. Moreover, the Trial Court seemed to be obsessed with idea of proof beyond reasonable doubt forgetting that offence under Section 138 of N.I. Act was a technical offence and the complainant is only supposed to prove that the cheques issued by the respondent were dishonoured, his statement that cheques were issued against liability or debt is sufficient proof of the debt or liability and the onus shifts to the respondent/ accused to show the circumstances under which the cheques came to be issued and this could be proved by the respondent only by way of evidence and not by leading no evidence. 6. The respondent in this case took the stand that he had replied to the notice but surprisingly he had not placed on record the copy of his reply. If it is believed that he had sent reply to the notice of the complainant, the copy of that reply must have been retained and could have been easily placed on record and proved by the respondent. Not placing the copy of reply on record and not proving it, in fact, prove the assertion made by the complainant that instead of sending reply, blank sheets of paper were sent in envelope to the complainant. 7. The respondent has placed reliance on Krishna Janardhan Bhat v. Dattatraya G. Hegde, 2008 Crl. L.J. 1172, which is also the case relied upon by the Trial Court. In this judgment itself Hon'ble Supreme Court has specifically observed that Court should not be blind to the ground realities and the rebuttal of presumption under Section 139 of N.I. Act would largely depend upon the factual matrix of each case. The Trial Court in this case turned a blind eye to the fact that every accused facing trial, whether under Section 138 of N.I. Act or under any penal law, when charged with the offence, pleads not guilty and takes a stand that he has not committed the offence. Even in the cases where loan is taken from a bank and the cheques issued to the bank stand dishonoured, the stand taken is same. Mere pleading not guilty and stating that the cheques were issued as security, would not give amount to rebutting the presumption raised under Section 139 of N.I. Act. If mere statement under Section 313 Cr. P.C. or under Section 281 Cr. P.C. of accused of pleading not guilty was sufficient to rebut the entire evidence produced by the complainant/ prosecution, then every accused has to be acquitted. But, it is not the law. In order to rebut the presumption under Section 139 of N.I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheques were issued. It was for the accused to prove if no loan was taken why he did not write a letter to the complainant for return of the cheque. Unless the accused had proved that he acted like a normal businessman/prudent person entering into a contract he could not have rebutted the presumption u/s 139 N.I. Act.

If no loan was given, but cheques were retained, he immediately would have protested and asked the cheques to be returned and if still cheques were not returned, he would have served a notice as complainant. Nothing was proved in this case. 8. In this case no evidence, whatsoever, was produced by the accused and the Trial Court travelled extra steps, not permitted by law, to presume that the presumption has stood rebutted. I, therefore, set aside the judgment of the Trial Court. 9. The accused is convicted under Section 138 of Negotiable Instrument Act. 10. List for hearing the convict on the quantum of sentence on 22nd September, 2010. SEPTEMBER 21, 2010 SHIV NARAYAN DHINGRA, J. acm