Bijender Sharma vs Anil Sabharwal on 14 September, 2017

Author: Ashutosh Kumar

Bench: Ashutosh Kumar

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*        IN THE HIGH COURT OF DELHI AT NEW DELHI

%                                          Reserved on: 31.08.2017
                                           Delivered on:14.09.2017

+        CRL.REV.P. 388/2017

BIJENDER SHARMA                                    ..... Petitioner

                          versus

ANIL SABHARWAL                                     ..... Respondent

Advocates who appeared in this case:
For the Petitioner: Ms.Suman Chauhan and Mr.Jivesh Tiwari.
For the Respondent: Mr.Dilip Pandita.


CORAM:-
HON'BLE MR JUSTICE ASHUTOSH KUMAR

                              JUDGMENT
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ASHUTOSH KUMAR, J

1. The petitioner has laid challenge to the judgment and order dated 06.10.2016/07.10.2016 passed by the Metropolitan Magistrate, South-01, N.I.Act, Saket Courts, New Delhi in Complaint Case No.117/2014 whereby he has been convicted for the offence under Section 138 of the Negotiable Instruments Act and has been sentenced to undergo SI for a period of eight months, to pay a fine of Rs.50 lakhs payable as compensation to the respondent/complainant and in default of payment of fine to further undergo SI for four months and the judgment in appeal (Crl.Appeal No.54/2016) passed by the learned Additional Sessions Judge/Special Judge, CBI-03, P.C Act, South District, Saket Courts, New Delhi whereby the judgment and order of conviction and sentence by the Trial Court has been affirmed and upheld.

2. The petitioner is alleged to have issued five cheques drawn on HDFC Bank, Chattarpur, New Delhi in favour of the respondent as security to a loan agreement which is said to have been executed on 17.01.2012 for having received Rs.50 lakhs from the respondent. The aforesaid cheques, on presentation by the respondent in the bank, were dishonoured because of the "instructions of stop payment". Hence the complaint.

3. It has been alleged in the complaint that the petitioner is a property dealer who was known to the respondent/complainant. On his asking, the respondent is said to have given a loan of Rs.50 lakhs on deposit of the title documents of land bearing No.56, Asola Village, Fatehpur Beri by the petitioner. It has been averred in the complaint that the respondent/complainant disposed of the second floor of his House No.90/5, Malviya Nagar, New Delhi for an amount of Rs.38 lakhs on 02.06.2011 and arranged for the balance amount of Rs.12 lakhs from one Rajesh Goel after mortgaging his property and paid the amount in cash to the petitioner/accused on 17.01.2012. On that date, five cheques were issued by the petitioner and a loan agreement was drawn on a stamp paper of Rs.100/-. The petitioner is also said to have deposited, as stated earlier, the document pertaining to plot No.56, Asola Village, Fatehpur Beri. After about a month of the giving of loan, it is alleged that the property document of Plot No.56, Asola Village was taken away and was substituted with the document of Plot No.39 on the pretext of selling off the property No.56, Asola Village, Fatehpur Beri for the purposes of repayment of loan. The allegation against the petitioner/accused is of having dilly dallied thereafter. One of the cheques was presented on 19.12.2013 for clearance which was returned unpaid with the remarks "payment stopped" vide return memo dated 20.12.2013, which was received by the respondent/complainant on 21.12.2013. Thereafter, on 01.01.2014, four other cheques were presented by the respondent/complainant which too were dishonoured with the same remark vide memo dated 02.01.2014 which was received by the respondent/complainant on 03.01.2014. Thereafter, the petitioner did not respond to the notice and instead sent a notice to the respondent/complainant denying the liability of payment of Rs.50 lakhs. It was stated in the aforesaid notice sent by the petitioner that he had received only Rs.50,000/- in cash in the month of January, 2012 and that also for six months only on interest at the rate of 5% and the petitioner had issued the aforesaid five cheques in blank with respect to the aforesaid loan. The notice sent by the petitioner inter-alia stated that the amount of Rs.50,000/- has already been paid along with interest and that in an unauthorized manner, the respondent/complainant withheld the cheques in question and has misused them.

4. In support of the complaint, the respondent/complainant examined himself as CW-1 and tendered his affidavit (Exh.CW-1/1). In the affidavit, he has relied upon Exh.PW-1/F which is a loan agreement. A perusal of Exh.PW-1/F indicates that it is undated document on a stamp paper of Rs.100/-. The wordings of the document are rather vague. The English translation of the same reads as follows:-

> "From me, Anil Sabharwal, son of Late G.S.Sabharwal, r/o.90/5, Malviya Nagar, New Delhi-110017, Bijender Sharma, s/o.Late Sh.Manmohan Sharma, r/o.373, Asola, Fatehpur Beri, New Delhi took loan of Rs.50 lakhs. As against the same, document of plot No.56, Asola Village has been given by way of security. Five cheques of Rs.10 lakhs bearing Nos.039723, 039724, 039725, 0397256 and 039727, HDFC Bank, Chattarpur Branch, New Delhi has been given."

5. The translation has been done by this Court. The wordings of the document are not very clear. It does not give a clear picture as to who was giving what and under what circumstances. The document does not mention anything regarding the date and the purpose of loan. It does not even state as to on which date loan was given.

6. In his cross-examination, the respondent/complainant has stated that in the financial year 2011-2012 and 2012-2013 he did not file the Income Tax return. He admitted that he did not disclose about his source of income in the complaint as also in his evidence by way of affidavit. However, he reiterated that he sold his property bearing No.90/5, Second Floor, Malviya Nagar for which he received Rs.38 lakhs and the rest of the amount i.e. Rs.12 lakhs was obtained from one Rajesh Goel. No document with respect to the sale of the property in question or the mortgage of another property in favour of Rajesh Goel for garnering Rs.12 lakhs has been brought on record. He further admits that the stamp paper (Exh.PW-1/F) was purchased on 08.02.2011. The document regarding plot No.56, Asola Village, Fatehpur Beri, New Delhi was substituted by another document of Plot No.39 of the same area.

7. In his evidence before the Trial Court, the respondent/complainant has stated that he had joined investigation in a case bearing FIR No.699/2014 (Exh.PW-1/D1).

8. He has also admitted that Exh.PW-1/D2 was lodged against him by the petitioner/accused with respect to Plot No.237, Asola Village, Fatehpur Beri. A suggestion was given to him that certain disputes had arisen between him and the petitioner/accused with respect to certain plot of land and because of that dispute, the complaint was filed so as to put pressure on the petitioner/accused to settle the dispute regarding Plot No.237.

9. On the contrary, the categorical statement of the petitioner in his 313 statement is that he had only taken a loan of Rs.50,000/- from the respondent/complainant in cash which was returned/repaid by installment of Rs.10,000/- along with interest. However, with respect to the aforesaid loan and repayment of the loan, no document was in possession of the petitioner/accused. The cheques in question were stated to have been given in blank as security for the loan of Rs.50,000/- which he had taken before. He has also, denied to have received any notice (Exh.PW-1/1 dated 08.01.2014).

10. From a perusal of the records, the following facts emerge in an undisputed manner. (i) respondent/complainant claims to have given a loan of Rs.50 lakhs on 17.01.2012 when a loan document was executed (Exh.PW-1/F) which has been drawn up on a stamp paper of Rs.100/- which was purchased on 08.02.2011; (ii) money was obtained by respondent/complainant after selling his property namely second floor of House No.90/5, Malviya Nagar, New Delhi on 02.06.2011 which fetched him Rs.38 lakhs; (iii) the balance amount of Rs.12 lakhs was obtained after mortgaging another property in favour of Mr.Rajesh Goel, a friend of the respondent/complainant; (iv) the respondent/complainant has not filed his Income Tax Returns. Obviously therefore, there is no reference of the aforesaid amount in the Income Tax Return either as receipt of sale of property/mortgage of property or as loan having been advanced to the respondent/complainant; (v) the respondent/complainant did not bring on record the document concerning the sale of second floor of his House No.90/5, Malviya Nagar, New Delhi which fetched him Rs.38 lakhs. There is nothing on record, at the instance of the respondent/complainant to infer about mortgage of another property in favour of Rajesh Goel who gave Rs.12 lakhs to him and which was also paid to the petitioner as loan. There were litigations between the parties for which FIRs were registered and investigated and (vi) the loan document (Exh.PW-1/F) was not registered and

the same was not put to the petitioner while his statement under Section 313 was being recorded by the Trial Court.

11. In order to appreciate the rival contentions of the parties, it would be necessary to examine Sections 118A, 138 and 139 of the N.I Act.

Section 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, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;
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> * * * * Section 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 provisions of this Act, be punished with imprisonment for 1[a term which may be extended 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--
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> (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;
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> (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, 2[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
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> (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.

Section 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.

12. For the application of provision of Section 138 of the NI Act, 3 ingredients are required to be satisfied, i.e., I. That there should be a legally enforceable debt; II. That the cheque should have been drawn from the account of the bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt;

and III. That the cheques so issued is dishonoured for insufficiency of funds.

13. Under Section 139 of NI Act, unless the contrary is proved, the holder of the cheque shall be presumed to have received the cheque in discharge of any debt or liability.

14. Sub-clause (a) of Section 118 of the NI Act, inter-alia, provides that unless the contrary is proved, the drawn up negotiable instrument, if accepted, has to be presumed to be for consideration.

15. In Goa Plast (P) Ltd. vs. Chico Ursula D'souza & Anr.: (2003) 3 SCC 232, the Supreme Court has held that that the provisions of section 138 to 142 of the NI Act, is for the purpose of giving credibility to negotiable instruments in business transactions. In view of section 139of the NI Act, it had to be presumed that a cheque is always issued in discharge of any debt or other liability. The presumption could be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption.

16. In Krishna Janardhan Bhat vs. Dattatraya G. Hegde: (2008) 4 SCC 54, the Supreme Court had the occasion to deal with the aforesaid provisions of the Act. In the aforesaid decision, the Supreme Court took the view that Section 139 of the NI Act merely raises a presumption in regard to the cheque having been issued in discharge of any debt or liability but not the existence per se of a legally recoverable debt.

17. However, in Rangappa vs. Sri Mohan, (2010) 11 SCC 441, a three judge bench of the Supreme Court held that Section 139 of the NI Act includes the presumption regarding the existence of a legally enforceable debt or liability and that the holder of a cheque is also presumed to have received the same in discharge of such debt or liability. It was clarified in the aforesaid decision that the presumption of the existence of a legally enforceable debt or liability is, of course, rebuttable and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. Without doubt, the initial presumption is in the favour of the complainant.

18. In Rangappa vs. Sri Mohan (Supra), section 139 of the NI Act is stated to be an example of a reverse onus clause which is in tune with the legislative intent of improving the credibility of negotiable instruments. Section 138 of the NI Act provides for speedy remedy in a criminal forum, in relation to dishonour of cheques. Nonetheless, the Supreme Court cautions that the offence under Section 138 of the NI Act is at best a regulatory offence and largely falls in the arena of a civil wrong and therefore the test of proportionality ought to guide the interpretation of the reverse onus clause. An accused may not be expected to discharge an unduly high standard of proof. A reverse onus clause requires the accused to raise a probable defence for creating doubt about the existence of a legally enforceable debt or liability for thwarting the prosecution. The standard of proof for doing so would necessarily be on the basis of "preponderance of probabilities" and not "beyond shadow of

any doubt".

19. The facts of the present case and the arguments advanced on behalf of the parties would now be analyzed in terms of what has been stated above.

20. Learned counsel appearing for the petitioner has strenuously argued that the loan document namely Exh.PW-1/F is a vague document and does not signify anything. It has been reiterated that the document is undated and does not convey any correct sense. It is really difficult to understand the import of what has been stated in the document (Exh.PW-1/F). All that can be inferred from the aforesaid document is that there was some transaction of Rs.50 lakhs for which five cheques were given. It does not even clearly state as to whether the five cheques were for Rs.10 lakhs each or all those five cheques were of Rs.10 lakhs. The stamp paper also appears to have been purchased on a much earlier date than the date on which the loan is said to have been given. That apart, it has been argued that under Sections 91 and 92 of the Evidence Act, when the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. When the terms of any such contract, reduced in the form of a document has been proved, no evidence of any oral agreement or statement would be admitted as between the parties to any such instrument for the purposes of contradicting its terms.

21. The document in question (Exh.PW-1/F) was compulsorily registerable as it was with respect to disposition of Rs.50 lakhs. In the absence of this document being registered, the same was not admissible and, therefore, it cannot be presumed that it was proved by the respondent/complainant. As stated earlier, the said document does not inspire confidence.

22. Learned counsel appearing for the petitioner has taken a plea that Exh.PW-1/F, the loan document referred to above was not put to the petitioner by the Trial Court while his statement was being recorded under Section 313 of the Code of Criminal Procedure. It has been argued that it was an incriminating material as against the petitioner and though the same has not been put to him, it could not be used against him in the trial. Consequently, it was urged that both the Courts below erred in fact and law in holding such document to be genuine and on the basis of which the petitioner was held guilty.

23. The argument of the petitioner, on that score is not fit to be accepted. It has been the consistent case of the prosecution that a loan of Rs.50 lakhs was advanced to the petitioner and the five cheques in question were issued by the respondent as a security thereof, which cheques on presentation were dishonoured. The mere fact of the document namely Exh.PW-1/F not having been put to the petitioner does not make any difference as it has not caused any prejudice to the petitioner. The document was brought on record and the petitioner subsequently took a plea that the document was forged and fabricated. Apart from this, the requirement of recording statement under Section 313 of the Cr.P.C in a summons trial can be dispensed with if the appearance of the accused is dispensed by the Trial Court. In any view of the matter, such an argument cannot be

countenanced as the petitioner has not been put to any disadvantageous position.

24. The petitioner has urged that not filing of the Income Tax Return for the relevant years and no such transaction of Rs.50 lakhs having been shown in any one of the Income Tax document renders the story of the prosecution improbable/unbelievable as it would only be an unaccounted money which may not be recoverable. It was further argued that an amount of Rs.50 lakhs, all of which is stated to have been given in cash, is a huge amount and non reflection of the same in any document clearly indicates the false assertion of the respondent/complainant. The aforesaid amount was obtained after sale of a portion of a house and mortgage of another property, about which details have not been provided by the respondent/complainant. When the property was sold and when the money was given to the respondent/complainant and for how long was it kept with him in his house is not certain. In that event, the entire transaction becomes unacceptable and unaccounted for.

25. True it is that in all cases where the loan transaction is not referred to or reflected in the Income Tax Returns, one cannot jump to a conclusion that the presumption under Section 139 of the N.I Act stand rebutted. In cases where the amount is small, the same principle may not apply. However, a huge amount of Rs.50 lakhs has to be explained or else even when such transaction is in the realm of suspicion, an imprimatur of the Court would be given if such transaction is accepted as a valid transaction. There is no gainsaying that non reflection of the loan transaction in the ITR certainly makes the loan unaccounted for, for which penalty could be imposed on the person concerned but it does not become per se unrecoverable. In the present case, seen along with the other facts, this lapse on the part of the petitioner assumes significance. It is thus difficult to presume that there existed a debt liability.

26. Though the petitioner has not stepped into the witness box to lead any evidence but in cases involving Section 138 of the Negotiable Instruments Act, the presumption of the existence of debt liability may be rebutted. The presumption could be rebutted even otherwise on the basis of attendant sets of circumstances and it may not be necessary in each case to expect the accused to lead evidence as in a criminal trial.

27. Learned counsel appearing for the respondent has raised a plea that the statement of the petitioner/accused recorded under Section 313 of the Code of Criminal Procedure cannot be equated with "any evidence" on his behalf. It was, therefore, urged that in the absence of the petitioner having led any evidence, the presumption under the Negotiable Instruments Act was not rebutted.

28. A statement under Section 313 of the Cr.P.C may not be the evidence of an accused as it is only in the nature of an explanation of an accused of the incriminating circumstances. There is no presumption of law that an explanation given by the accused is always truthful but once a doubt has been created regarding the existence of the debt liability, the reverse onus requirement as has been seen in Rangappa (Supra), makes it incumbent upon the respondent/complainant to prove that loan was advanced and there existed a liability.

29. This Court finds it difficult to believe that Rs.50 lakhs would be advanced as loan to a person who is on litigating terms with the complainant and that also by selling off his property. We have no

evidence whatsoever regarding the sale of the property or mortgage of another property to establish the liquidity/capacity of the complainant to advance loan.

30. Cumulatively seen, the case of the respondent/complainant falls at the seams.

31. Thus the judgment and the order of the Trial Court as well as the Appellate Court are not fit to be sustained in the eyes of law.

32. There is no option for this Court but to set aside the same.

33. The petitioner stands acquitted and is discharged of all his liability.

34. The petitioner shall be released forthwith in the event of his being in custody and not required in any other case. Crl.M.B.978/2017& Crl.M.B.1075/2017 (Suspension of sentence)

1. In view of the petition having been dismissed, the applications have become infructuous.

2. The applications are disposed of accordingly.

ASHUTOSH KUMAR, J SEPTEMBER 14, 2017 k