Delhi District Court

Smt. Meenu vs . on 22 January, 2020

IN THE COURT OF SHRI AJAY SINGH PARIHAR,
METROPOLITAN MAGISTRATE (WEST) NI ACT, WEST DISTT. THC,
DELHI

CC No. 10928/2016

Smt. Meenu,
W/o Shri Ved,
R/o B-1/311, Sultanpuri,
Delhi. ..... Complainant

Vs.

Smt. Laxmi,
W/o Shri Mukesh,
R/o B-35, LSC Market,
Sultanpuri, Delhi - 86. .....Accused

Date of Institution : 30/01/2015
Offence complained of : S.138 N.I. Act
Date of Decision: 22/01/2020

COMPLAINT UNDER SECTION 138 NEGOTIABLE
INSTRUMENTS ACT, 1881

JUDGMENT

1. The present complaint has been filed by the complainant against the accused under section 138 Negotiable Instruments Act, 1881.

2. The brief facts as alleged by the complainant in his complaint are that accused approached complainant for financial assistance of Rs. 70,000/-. The complainant provided a loan of Rs. 70,000/- to the accused on 17.11.2012 for a period of 2 years and a written agreement was executed between the parties on the same day.

3. That the accused issued a cheque bearing No. 381347 of Rs. 1,00,000/- dated 27.11.2014 drawn on Indian Overseas Bank, Nehru Market, Rajouri Garden, New Delhi including the principle amount and the interest to the complainant. The said cheque was dishonoured vide return memo dated 01.12.2014 with the reason of funds insufficient.

4. The complainant thereafter issued a legal demand notice dated 28.07.2016 through his counsel by way of registered AD and speed post, calling upon the accused person to pay the said cheque amount within a period of 15 days from the date of receipt of the notice. The said notice was duly served upon the accused. However, despite service of the legal demand notice, the accused person failed to pay the aforesaid dishonoured cheque amount. Hence, the present complaint u/s 138 Negotiable Instrument Act 1881 (hereinafter the NI Act) was filed on 22.01.2015.

5. In order to prove his case, the complainant examined himself as CW-1 by way of affidavit EX C-1/A and has relied upon the following documents:

(a) Agreement Ex CW-1/1.

(b) Cheque No. 381347 dated 27.11.2014 drawn on Indian Overseas Bank, New Delhi - 27 Ex CW-1/2.

(c) Return memo dated 01.12.2014 Ex CW-1/3.

(d) Legal notice, Postal receipt Ex CW-1/4 (colly).

6. On finding a prima-facie case against the accused, the accused was summoned on 20/05/2015, upon which she appeared before the court on 18/02/2016.

7. Thereafter, notice u/s 251 Cr.P.C. was framed against the accused on 28/07/2016 to which she pleaded not guilty and claimed trial. The plea of defence of the accused was recorded where she stated that "I do not plead guilty and have defence to make. The present cheque in question bears my signatures but I have not filled up the other particulars in the cheque. I had given the cheque in question as a security as I had taken a loan of Rs. 40,000/- from her. The complainant has also taken my signatures on an agreement. However, I did not read the agreement as I cannot read. I have not repaid the abovesaid loan amount to the complainant but I am willing to repay the same. I used to work in the house of the complainant and the complainant has deducted interest from my salary. I have not taken the alleged loan amount from the complainant. I have not received legal demand notice issued by the complainant qua the cheque in question. I do not owe any liability towards the complainant qua the cheque in question. I want to lead defence evidence"

8. After the framing of notice the complainant examined himself as CW-1 and also examined Ms. Jyoti as CW-2. CW-1 and CW-2 were cross examined by the Ld. Counsel for the accused, thereafter complainant evidence was closed and the matter was listed for statement of the accused u/s 313 Cr.P.C.

9. Statement of accused was recorded u/s 313 Cr.P.C. r/w Section 281 Cr.P.C. on 03/08/2019 wherein all the incriminating circumstances appearing in evidence against the accused was put to her to which the accused stated that "I obtained a loan of Rs. 40,000/- from the complainant. I have already repaid Rs. 36,000/- which was deducted out of my salary as I used to work for the complainant. I issued the cheque as security".

10. After recording the above said statement of the accused, the accused led evidence wherein accused got herself examined as DW-1. Witness was cross examined and discharged. Thereafter, the matter was listed for final arguments.

11. The Ld. Counsel for the complainant and the accused person were heard at length in the present case and the matter was reserved for judgment.

12. The submissions made by the Ld. Counsel for the complainant and the accused person have been heard and the record of the case has been thoroughly perused.

13. Before proceeding to the merits of the case, it is important to lay down the basic provision of law with respect to section 138 of the NI Act which is as follows: Section 138 of Negotiable Instruments Act, 1881 makes dishonour of cheques an offence. It provides that "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 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"

14. In order to ascertain whether the accused has committed an offence u/s 138 NI Act, the following ingredients constituting the offence have to be proved:

(a) The drawer of the cheque should have issued the cheque for the discharge, in whole or in part of a legally enforceable debt or other liability.

(b) The cheque 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.

(c) The drawer of such cheque fails to make the payment of the said amount of money within fifteen days of the receipt of the notice from the payee or the holder in due course demanding the payment of the said amount of money.

It is only when all the above mentioned ingredients are satisfied that the person who has drawn the cheque can be said to have committed an offence u/s 138 NI Act.

15. It is important to reproduce Sec.118 of the Indian Evidence Act, 1872 and Sec.139 of N.I. Act here also in this regard:

Section 118(a) of the Act provides that until the contrary is proved, it shall be presumed that "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.

17. Further, Section 139 of the Act lays down that "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.

In the case of Hiten P. Dayal Vs. Bratindranath Bannerjee (2001)6 SCC 16, the Hon'ble Supreme Court of India had observed that "Because both sections 138 and 139 Cr.P.C. required that the court shall presume the liability of the drawer of the cheque for the amount for which the cheques are drawn as noted in State of Madras Vs. A.Vaidyanatha Iyer AIR 1958 SC 61, it is obligatory on the court that to raise this presumption in every case where the factual basis for raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused"

Further, in the case of K.N. Beena Vs. Muniyappan AIR 2001 SC 2000, it was established as follows :

> "In complaint u/s 138 the court has to presume that the cheque had been issued for a debt or liability, this presumption is rebuttal, however, the burden of proving that the cheque has not been issued for the discharge of debt or liability is lies on the accused".

18. The accused has stated in her defence u/s 251 of Cr.P.C. that she has given the cheque to complainant as security, however, the signature on the cheque has been admitted by the accused. In such circumstances, the statutory presumption u/s 118 Indian Evidence Act and Section 139 NI Act is raised in favour of the complainant.

19. In the case of Rangappa Vs. Sri Mohan (2010) 11 SCC 441, it was held that the presumption mandated by section 139 of NI Act does include the existence of a legally enforceable debt or liability. This is in the nature of the rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. 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. The rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man.

20. It is the case of complainant that the accused obtained a loan of Rs. 70,000/-, however, rate of interest was not agreed and that whatever interest is paid by accused that will be acceptable to complainant.

Complainant has relied upon the agreement of loan Ex. CW-1/1, however, the said agreement has no mention of interest.

Ld. Counsel for the accused has submitted that accused took loan of Rs. 40,000/- only and Rs. 36,000/- has been repaid via monthly deduction from the salary of accused, since accused was working as maid with complainant. Ld. Counsel for the accused has submitted that there was no agreement upon the interest part and that accused doesn't have liability of Rs. 1,00,000/- which as per complaint includes interest.

Ld. Counsel for the accused has relied upon order of Hon'ble High Court of Delhi titled as Starkey Laboratories India Pvt. Ltd. Vs. Sanjay Gujral in Crl. L.P. 492/2017 dated 24.09.2019.

It is the consistent defence of accused that, she obtained a loan of Rs. 40,000/- only and Rs. 36,000/- has already be repaid as deduction from salary. It is further the defence of accused that cheque in question was only security cheque.

Section 91 of Indian Evidence Act 1872 provides that if terms of any contract is reduced into writing and has been proved as per Section 90 of Indian Evidence Act, 1872 then no evidence of any oral agreement or statement shall be admitted between the parties to such contract for contradicting, varying, adding to or subtracting from its terms.

The complainant has proved agreement CW-1/1, which does not include any terms in respect of interest and as per Sec. 91 Indian Evidence Act 1872 no evidence of oral agreement can be lead to add interest aspect to the contract of loan.

Ld. Counsel for the complainant submitted that CW-2 Ms. Jyoti was also examined, who is witness to agreement of loan Ex. CW-1/1. Though the complainant examined CW-2 Ms. Jyoti, the witness has stated in cross- examination that she did not sign any document / agreement. The witness has not deposed anything upon the interest rate or loan amount. At best the witness has only proved the loan agreement Ex. CW-1/1.

The cheque amount is admittedly more than the loan amount and accused has discharge the burden as far as it relates to cheque amount.

Ld. Counsel has rightly relied upon the order of Hon'ble High Court of Delhi titled as Starkey Laboratories India Pvt. Ltd. Vs. Sanjay Gujral in Crl.L.P. 492/2017 dated 24.09.2019 wherein Hon'ble High court has observed as under: -

"6. As per the books of the petitioner, a sum of Rs. 1,49,569/- was outstanding as on 11.10.2012. However, the petitioner waited for over two years to fill an amount of Rs. 2,00,000/- in the said blank cheque and deposited the same. According to the petitioner, the amount of Rs. 1,49,569/- had increased to Rs. 2,16,247/- as on the date of depositing the cheque, on account of interest calculated at the rate of 24% per annum.

7. The trial court had noted that there was no contract or arrangement whereby the respondent had agreed to pay any interest.

8. In the aforesaid view, the petitioner had been unable to establish that the cheque of Rs. 2,00,000/- had been issued by the respondent against any such liability. Even if it is accepted that the sum of Rs. 1,49,569/- was due from the respondent as on 11.10.2012, as deposed on behalf of the petitioner, the liability of Rs. 2,00,000/- was not established."

The Hon'ble High Court has dismissed the complaint in view of the observation.

Since the accused has discharged the burden it was complainant who has to prove the guilt of accused beyond reasonable doubt.

The complainant has not able to prove any subsequent agreement in respect of interest so as to add to the terms of Ex. CW-1/1 i.e. loan agreement.

16. The Hon'ble Apex Court in the landmark judgment titled as "The Hon'ble Apex Court in the epic Judgment passed in the case titled as 'Sharad Birdichand Sarda vs State of Maharasthra' (1984) 4 SCC 116, while discussing the principles of appreciation of prosecution and defence evidence, has held that- "It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law. However, where various links in a chain are in themselves complete, then a false plea or false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court".

17. It is all more significant that presumption can only be raised in furtherance of prosecution case and not in derogation of the same. The three judge bench of Hon'ble Supreme Court in a case dealing with prevention of Corruption Act has observed in respect of presumption of law in "Trilok Chand Jain vs State of Delhi', 1977 AIR 666 as under:- 'The presumption therefore, can be used in furtherance of the prosecution case and not in derogation of it. If the story set up by the prosecution inherently militates against or is inconsistent with the fact presumed, the presumption will be rendered sterile from its inception".

18. Thus, in view of the totality of the circumstance and the settled legal positions as discussed above, the complainant has not been able to discharge his burden. It is also relevant to mention here that it is of paramount importance to demand evidence of unambiguous, impeccable and of unimpeachable in nature so as to entail criminal conviction of the accused and which the complainant has failed to bring.

19. In the case of 'Kulvinder Singh vs Kafeel Ahmad'', Crl L. P. 478 of 2011, decided on 04.01.2013,Hon'ble Delhi High Court has held that the basic principle in criminal law is that the guilt of the accused / respondent, must be proved beyond reasonable doubts and if there is any slightest doubt about the commission of an offence, then the benefit has to accrue to him.

20. At the same time, it is important to underscore the established canon of criminal law that in order to pass a conviction in a criminal case, the accused "must be" guilty and not merely "may be" guilty. The mental distance between "may be" guilty to "must be" guilty is a long one and must be travel not on surmises and conjectures, but by cogent evidence. In this case, after the accused successfully rebutted the presumption of consideration by raising a doubt on the very factum of the transaction of loan. The accused has clearly presented a case which is superior in way. And as per the settled law, this is all that what is required, as preponderance of probabilities is not a rigorous standard of proof, but only so much evidence as makes the court lean in, in favour of one side and

not the other. Consequently, the benefit of doubt must go to the accused. The material on record does not suggest that the accused "must be" guilty whichever way one looks at it.

21. In view of the above discussions, the present case appears to be a fit case where benefit of doubt can be extended to the accused. Accordingly, in view of the above discussions, I hold that the complainant has failed to prove his case. The accused has been able to rebut presumption under Section 118 and 139 NI Act arising in favour of the complainant.

22. In light of foregoing reasons, it is clear that accused Laxmi has succeeded in rebutting the presumption of legal liability and the complainant has failed to prove the same affirmatively. As a result, accused Laxmi stands acquitted from the offence u/s 138 NI Act. AJAY Digitally signed by AJAY SINGH SINGH PARIHAR Date: 2020.01.23 PARIHAR 14:56:35 +0530 Announced in the open court (AJAY SINGH PARIHAR) on 22/01/2020. MM-04(NI) ACT (West) THC, Delhi / 22/01/2020