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Delhi High Court

Case No: Criminal A. 1011 of 2013

S.K. Jain		APPELLANT
	Vs	
Vijay Kalra		RESPONDENT

Date of Decision: March 6, 2014

Acts Referred:

- Constitution of India, 1950 - Article 136
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 114 3 4
- Income Tax Act, 1961 - Section 269SS
- Negotiable Instruments Act, 1881 (NI) - Section 118 118(a) 138 139

Citation: (2014) 4 Crimes 20 : (2014) 208 DLT 503 : (2014) 2 JCC(NI) 54

Hon'ble Judges: V.K. Jain, J

Bench: Single Bench

Advocate: Ajay K. Chopra, for the Appellant; Vasudha V. Indurkar, for the Respondent

Final Decision: Dismissed

Judgement

V.K. Jain, J.

The appellant in Crl. A. No. 1011/2013, namely Shri S.K. Jain is the husband of the appellant in Crl. A. No. 1012/2013, namely Smt. Sneh Jain. Two separate complaints-one by Shri S.K. Jain and the other by Smt. Sneh Jain, were filed u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act"). It was alleged in the complaint filed by Shri S.K. Jain that in September, 2002, the respondent/accused approached him and his wife for a loan of Rs. 31.00 lakh. The complainant, Shri S.K. Jain, was earlier running a finance company by the name Umang Fincap Private Limited. He and his wife agreed to advance loan of Rs. 31.00 lakh to the respondent, subject to the condition that he would return the same with interest after one (1) year. It was further alleged in the complaints that the complainants, S.K. Jain and his wife, had given this money out of the funds which they had kept for the marriage of their three daughters and

the amount which he had acquired after selling his property in Rohini. It was further stated that in January, 2005, the respondent/accused issued a cheque of Rs. 10.00 lakh drawn on Oriental Bank of Commerce, Kingsway Camp, New Delhi in favour of the respondent, in discharge of his part liability, and requested him not to present the cheque till February, 2005. It was further alleged that in February, 2005, one more cheque, this time of Rs. 4.35 lakh, was issued by the respondent in favour of the complainant, towards discharge of his liability. The said cheque was drawn on Punjab National Bank, Mall Road, Delhi. Both these cheques were deposited by the complainant with his banker, but the first cheque was returned with the remarks "Stop Payments" and the second with the remarks "Insufficient Funds". After serving a legal notice upon the respondent the aforesaid complaint was filed by Shri S.K. Jain. Similar allegations were made in the complaint filed by Smt. Sneh Jain. In that case, one cheque dated 17.1.2005 for Rs. 10.00 lakh is alleged to have been issued by the respondent/accused in January, 2005 and the other cheque for Rs. 11.00 lakh dated 24.1.2005 is alleged to have been issued later. The aforesaid cheques were presented to the bank. Yet another cheque, this time of Rs. 9,13,500/- is alleged to have been issued by the respondent in February, 2005. The first two cheques were returned by the bank with the remarks "Stop Payment" whereas the third cheque was returned with the remarks "Insufficient Funds". A legal notice was thereafter served upon the respondent and since no payment was made within the prescribed period, the aforesaid complaint was filed by Smt. Sneh Jain.

2. In his affidavit by way of evidence Shri S.K. Jain supported on oath the averments made in the complaint. However, in the cross-examination he stated that from 2002 to 2008, he was doing a private job, getting a salary of less than Rs. 10,000/- per month. He also stated that he had four children including three daughters. He also claimed that House No. B2/34, Sector 15, Rohini was sold by him for a consideration of Rs. 22.00 lakh.

3. In his statement u/s 313 Cr.P.C., the respondent/accused inter alia stated that he had taken a loan of Rs. 1.50 lakh from the complainant and had given three-four signed blank cheques to him. Thereafter, he returned the loan amount, which was acknowledged by the complainant but the blank cheques which he had give to the complainant were not returned by him. The respondent also came in the witness box as DW1 and claimed that the loan of Rs. 1.50 lakh which he had taken from the complainant was repaid as per bank statement Ex. DW1/A & DW1/B. During cross-examination, he denied the suggestion that the aforesaid amount of Rs. 1.50 lakh had nothing to do with the complaint filed in the court.

4. In the complaint filed by Smt. Sneh Jain, she filed affidavit by way of evidence, confirming on oath the averments made in the complaint. During cross-examination she stated that they had saved money from the income of her husband for the marriage of their daughters and had also sold a house.

In the complaint filed by Smt. Sneh Jain also, the respondent came in the witness box as DW1 and stated on the line of his deposition in the other complaint.

5. Vide impugned judgment dated 4.1.2012, both the complaints were dismissed on the ground that the complainants had failed to prove that the cheques in question were issued for consideration.

6. The impugned judgment has been assailed by the learned counsel for the appellants primarily on the ground that as provided in Section 118 of the N.I. Act, there is a statutory presumption that the cheques in question were issued by the drawer of the cheques for consideration and, therefore, the onus was upon the respondent to prove that the cheques were without consideration. According to the learned counsel, the respondent failed to discharge the said onus placed on him. There can be no dispute with the legal proposition that there is a statutory presumption of a negotiable instrument including a cheque having been issued for consideration. Therefore, the initial onus would be upon the drawer of the cheque to prove that the cheque in question was issued without consideration. However, once some evidence has been led, by the party on whom the onus is placed by law to prove a fact, the initial onus placed on him stands discharged and thereafter, the court has to decided, on the basis of the evidence led by the parties as to whether, the cheque in question was issued for consideration or not. In the present case, the respondent came in the witness box as DW1 and stated on oath that he had taken a loan of only Rs. 1.50 lakh which he had later repaid. He also stated that as many as five (5) cheques were given by him as security. During his cross-examination the complainant/appellant did not dispute that the respondent had taken a loan of Rs. 1.50 lakh though it was claimed that the said loan had nothing to do with the complaint pending before the Court, meaning thereby that the complainants do not dispute that the respondent had actually taken a loan of Rs. 1.50 lakh which he had later repaid.

7. A perusal of the complaint would show that it is silent with respect to the exact date on which the loan of Rs. 15.00 lakh is alleged to have been given. Though the case set out in the complaint is that interest was payable on the loan, the complaint is silent as regards the rate of interest agreed to between the parties.

8. According to the complainant he was earning less than Rs. 10,000/- per month from 2002 to 2008, he being in a private job. No such evidence has been led by the complainant which would show that he was earning so much, prior to September, 2002, that he could have saved as much as Rs. 31.00 lakh after meeting his family expenditure including the expenditure on his four (4) children. Neither the complainant nor his wife produced their respective income tax returns before the Court. In fact, they did not even tell the court what was their income prior to September, 2002. It would, therefore, be difficult to accept that they were in a position to save as much as Rs. 31.00 lakh with them. Even otherwise it would be unrealistic to expect that a person of modest means would keep a huge amount to the extent of Rs. 31.00 lakh in cash with him, instead of investing the same in a bank or some other instrument. In the normal course of human

conduct, a person having substantial cash with him would like to invest it either with a bank or in a financial instrument so as to earn interest on that amount instead of allowing it to remain idle with him. In view, it would be against the normal course of human conduct, for a person of modest means such as the complainant before this Court and his wife, to keep such a huge amount in cash with them, instead of earning additional income by way of return on the said amount.

9. As regards sale of the property, I find that two certified copies of the sale deed purported to have been executed by Smt. Sneh Jain are on record. The first sale deed is in respect of part of House No. 34, Block B, Pocket 2, Sector 15, Rohini. As per the sale deed a part of the aforesaid house was sold for a consideration of Rs. 3.00 lakh out of which Rs. 2.85 lakh was received by way of a pay order and Rs. 15,000/- was received in cash. This is not the case of the complainants that they had withdrawn money from any bank for the purpose of advancing loan to the respondent. Therefore, they got only Rs. 15,000/- in cash by sale of the aforesaid part of the property. The second sale deed is in respect other part of the House No. 34, Block B, Pocket 2, Sector 15, Rohini. This sale deed has been executed for a total sale consideration of Rs. 1.50 lakh out of which Rs. 30,000/- is stated to have been received in cash and Rs. 1.20 lakh by way of cheque. Therefore, the complainants received only Rs. 30,000/- in cash by sale of the aforesaid property. Thus, the total cash surplus with them by sale of House No. 34, Block B, Pocket 2, Sector 15, Rohini was Rs. 45,000/-. No other sale deed was produced by the complainants by way of evidence. Though it has come in the deposition of Smt. Sneh Jain that House No. B-1/24, Sector 15, Rohini was sold by them for Rs. 22.00 lakh, no sale deed of the aforesaid house has been produced by them to prove the alleged sale.

10. In the case before this Court also admittedly, no agreement or promissory note was executed at the time the loan of Rs. 31.00 lakh is alleged to have been advanced by the complainant to the respondent. u/s 269SS of the Income Tax Act, 1961, a loan of more than Rs. 20,000/- cannot be advanced except by way of a cheque/demand draft, etc. Advancing cash loan of more than Rs. 20,000/- is punishable under the aforesaid Section. The complainant S.K. Jain admittedly was in the business of lending money, since according to him he was earlier running a finance company. Hence, he would be aware of the aforesaid legal provision. Therefore, he was unlikely to advance a huge amount by way of loan, by making cash payment. There could have been no reason for a person like him not to deposit the amount alleged to be lying in cash with him in the bank and then issue a cheque in the name of the respondent. Therefore, the conduct of the complainant was not that of a prudent businessman who has experience in the business of money lending.

11. In John K. John Vs. Tom Varghese & Anr. 2007 (4) CCC 690 (S.C.), the Hon''ble Supreme Court in the context of Section 139 of N.I. Act which provides for a statutory presumption in favour of the holder of a cheque, inter alia observed as under:

10. ...Presumption raised in terms of Section 139 of the Act is rebuttable. If, upon analysis of the evidence brought on records by the parties, in a fact situation obtaining in the instant case, a finding of fact has been arrived at by the High Court that the cheques had not been issued by the respondent in discharge of any debt, in our opinion, the view of the High Court cannot be said to be perverse warranting interference by us in exercise of our discretionary jurisdiction under Article 136 of the Constitution of India. The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged...

In Hiten P. Dalal Vs. Bratindranath Banerjee, the Apex Court inter alia observed that the statutory presumption does not preclude the person against whom the presumption is drawn from rebutting it and proving to the contrary, 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.

In Kumar Exports Vs. Sharma Carpets, , the Hon''ble Supreme Court, in this regard held as under:

The accused in a trial u/s 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant.

The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

In M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, the Apex Court dealing with the statutory presumption u/s 118(a) and 139 of the N.I. Act inter alia held as under:

29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause)...

30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

xx xx xx

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

xx xx xx

41...Therefore, 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".

For the reasons stated hereinabove, I find no good ground to interfere with the view taken by the learned trial Judge.

The appeals are devoid of any merits and are accordingly dismissed.