(2008) 09 DEL CK 0282

Delhi High Court

Case No: Criminal L.P. No. 177 of 2005

N. Chirag Travels (P) Ltd.		APPELLANT
	Vs	
Ashwani Kumar and Another		RESPONDENT

Date of Decision: Sept. 1, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 378
- Evidence Act, 1872 - Section 3
- Negotiable Instruments Act, 1881 (NI) - Section 118, 138, 139
- Penal Code, 1860 (IPC) - Section 499

Citation: (2008) 4 BC 379

Hon'ble Judges: Kailash Gambhir, J

Bench: Single Bench

Advocate: Puneet Mittal and S.S. Goela, for the Appellant; Chander M. Maini, for the Respondent

Final Decision: Dismissed

Judgement

Kailash Gambhir, J.

By way of this application filed u/s 378, Cr.P.C. the applicant seeks grant of special leave to appeal against the order of acquittal dated 12.9.2005 passed by the Court of Mr. A.K. Sarpal, Metropolitan Magistrate, New Delhi in Complaint Case No. 1998/1/03 titled as N. Chirag Travels (P) Ltd. v. Ashwani Kumar. Brief facts relevant for deciding the present application are:

That the accused Sh. Ashwani Kumar, respondent No. 1 herein approached the complainant M/s. N. Chirag Travels (P) Ltd., appellant herein for purchase of air tickets which were duly supplied and received by him vide invoice No. 4932 for Rs. 20,667/-; invoice No. 4933 for Rs. 23,670/- and invoice No. 4934 for Rs. 13,504/-. The accused as consideration of the tickets purchased and in discharge of his liabilities, signed and issued a cheque bearing No. 486618 dated 6.8.2003 drawn on HDFC

Bank Ltd., S-65, G.K.-I, New Delhi for Rs. 56,690/- from an account maintained by him in the name of M/s. Bake Town, of which he is the authorized signatory. The aforesaid cheque when presented for encashment was dishonoured due to "Stop payment" vide cheque returning memo dated 7.8.2003 and despite receipt of demand notice dated 5.9.2003 sent through registered post, the accused failed to pay the cheque amount and hence the complaint u/s 138, N.I. Act, 1881 was made against the accused. Based on the said facts and after taking into consideration the pre-summoning evidence, the concerned Magistrate took cognizance of the offence against respondent No. 1. On merits the applicant examined one witness, namely, Avdesh Singh who was cross-examined by Counsel for respondent No. 1. In his statement recorded u/s 313, Cr.P.C. respondent No. 1 stated that he had issued cheque in a sum of Rs. 56,690/- as advance payment for three air tickets, but got the same stopped as he had received only one ticket against one invoice. Counsel also stated that he was ready to make the payment against one air ticket issued against invoice for a sum of Rs. 20,667/-. Learned Magistrate after taking into consideration the said facts and evidence adduced in support thereof came to the conclusion that the applicant failed to establish that it had in fact supplied three tickets to respondent No. 1. The Court also did not feel convinced with the genuineness of the invoices placed on record by the applicant. The Court also drew adverse inference against the appellant due to non-examination of Ms. Rica Goldsmith and M.S.M. Singh, beneficiaries of the other two air tickets.

2. Aggrieved with the said order of acquittal, Mr. Puneet Mittal, Counsel appearing for the applicant raised a serious challenge to the said decision of the Trial Court ignoring the mandate of law laid down u/s 139 of the Negotiable Instruments Act, 1881. The contention of the Counsel for the applicant was that Section 139 of the Negotiable Instruments Act raises a presumption in favour of the holder of the cheque, the same being issued in discharge of the liabilities, until the contrary is proved. The fact of issuance of cheque by respondent No. 1; the same getting dishonoured after its presentation by the applicant and receipt of demand notice, once these three factors are established by the complainant, then, it is for the accused to prove in contradiction to show as under what circumstances, the cheque issued was not towards the discharge of the legal debt. Mr. Puneet Mittal, Counsel for the applicant further contended that the said fact could be rebutted by the drawer only by adducing evidence on record, in defence and not merely by giving some suggestions to the witness of the complainant in cross-examination. Mr. Puneet Mittal further submitted that the applicant had sufficiently proved before the Trial Court that three invoices were separately raised in the name of respondent No. 1 besides proving the pre-paid ticket advice for the passenger travelling on behalf of the accused at Mumbai Airport. Counsel thus stated that the Trial Court has unnecessarily given undue weightage to the non-examination of Ms. Rica Goldsmith and M.S.M. Singh, the two beneficiaries of air tickets. He further submitted that the learned Trial Court has unnecessarily raised suspicion on the invoices proved by the

applicant on record as well as prepaid ticket advice, confirmation of which was received from the Jet Airways. In support of his arguments Counsel for the applicant has placed reliance on the following judgments:

1. Goa Plast (P) Ltd. Vs. Chico Ursula D''Souza,

2. Hiten P. Dalal Vs. Bratindranath Banerjee,

3. Suthenthiraraja @ Santhan and Others etc. etc. Vs. State Through DSP/CBI, SIT, Chennai etc. etc.,

3. Opposing the grant of special leave Mr. Chander M. Maini, Counsel appearing for respondent No. 1 vehemently contended that there is a very limited scope for the High Court to interfere with the acquittal order unless there are very strong reasons which can dislodge the findings arrived at by the Trial Court. Even in a case where two possible views can be found from the material on record, one in favour of the accused and the other against the accused, the High Court would not reverse the acquittal merely because it finds the other view more plausible or preferable, Counsel contended. Counsel further submitted that for proving guilt of the accused, the prosecution has to prove the case beyond all reasonable doubt and the same standard of proof is not required for the defence. The contention of the Counsel for the respondent is that it is not necessary for accused to give his own evidence in defence and he may discharge his burden on the basis of the material already brought on record wherefrom he can show enough suspicion to disapprove the case of the complainant. An accuse has a constitutional right to maintain silence and standard of proof as required of the prosecution and of the accused in a criminal case stand on different pedestal, contended Counsel for the respondent. Elaborating his arguments further Counsel contended that the applicant failed to prove on record that three air tickets were availed by respondent No. 1 or same were duly delivered by the applicant to respondent No. 1 or the said two beneficiaries of the two air tickets were at the instance of respondent No. 1. Right from the initial stage respondent No. 1 had admitted his liability for payment of fare of one air ticket i.e. Rs. 20,667/- and this in itself would show complete honesty on the part of respondent No. 1, contended, Counsel for respondent No. 1. Counsel also submitted that in cross-examination of the applicant''s witness Mr. Avdesh Singh the entire case of the applicant got demolished and that was sufficient enough to rebut the presumption as drawn in favour of the applicant u/s 139 of the Negotiable Instruments Act.

4. I have heard learned Counsel for the parties at considerable length and perused the record.

5. Before this Court advert to the said questions, it would be worthwhile to notice the provisions of Sections 118(a) and 139 of the Act which read as under:

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;

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.

6. The Negotiable Instruments Act raises two presumptions: firstly, in regard to the passing of consideration as contained in Section 118(a) therein and, secondly, a presumption that the holder of cheque receiving the consideration of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118(a) and 139 are rebuttable in nature. Having regard to the definition of terms ''proved'' and ''disproved'' as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

7. In this regard, in K. Prakashan Vs. P.K. Surenderan, , the Hon''ble Apex Court observed as under:

18. The said legal principle has been reiterated by this Court in Kamala S. v. Vidhyadharan M.J. wherein it was held: (SCC p. 270, paras 15-17)-

15. The Act contains provisions raising presumption as regards the negotiable instruments u/s 118(a) of the Act as also u/s 139 thereof. The said presumptions are rebuttable ones. Whether presumption stood rebutted or not would depend upon the facts and circumstances of each case.

16. The nature and extent of such presumption came up for consideration before this Court in M.S. Narayana Menon v. State of Kerala wherein it was held: (SCC p. 50, para 30)-

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.

17. This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefore can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on the accused is not as high as that of the prosecution, it was held (M.S. Narayana Menon case, SCC p. 51, para 33)

33. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another.

8. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability.

9. In this regard, in M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, , the Hon''ble Apex Court observed as under:

46. In Harbhajan Singh v. State of Punjab this Court while considering the nature and scope of onus of proof which the accused was required to discharge in seeking the protection of Exception 9 to Section 499 of the Penal Code, stated the law as under (SCR pp. 242 H-243 A)-

In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him.

47. In V.D. Jhingan v. State of Uttar Pradesh it was stated (SCR p. 739 H)-

It is well established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.

(See also State of Maharashtra v. Wasudeo Ramchandra Kaidalwar.)

48. In Kali Ram v. State of H.P. Khanna, J., speaking for the three-Judge Bench, held (SCC p. 819, para 23)-

One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the Courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the

prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

49. In State (Delhi Admit.) v. Sanjay Gandhi, it was stated (SCC p. 420, para 14)-

Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example, the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. He does not have to establish his case beyond a reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial like the cancellation of bail of an accused.

10. In the instant case, the accused admitted only receipt of one ticket vide invoice Ex. CW1/B and denied having received the other two tickets vide invoice Exs. CW1/C and CW1/D. The invoices viz. Exs. CW1/C and CW1/D do not bear signatures of the accused in token of receipt of tickets. Sh. Krishan Singh who allegedly handed over the three tickets to the accused was not brought in to the witness box for examination-in-chief, and same proved fatal to the case set up by the complainant when at one time PW1 Sh. Avdesh Singh mentioned in his complaint that the tickets were delivered by Kishan Singh and then in later point of time stated that it is not in his knowledge that tickets were delivered by Kishan Singh. Another thing which catches attention is that the two disputed tickets were allegedly in the name of Ms. Rica Goldsmith and Mr. M.S.M. Singh but nothing proved on record to show relation or connection of these two persons with the accused. Further, the document issued by Jet Airways, Ex. CW1/D1 produced by PW1 during his deposition, according to which Ms. Rica Goldsmith used one ticket is also of no help to the complainant as the said document is only a photocopy and original was not brought before the Court, also nobody was examined from Jet Airways to prove authenticity of the said document. The invoices CW1/C and CW1/D also raise suspicion as these invoices are photocopies and the particulars pertaining to the addresses where filled in later on in a different ink. Also, nobody was examined by the complainant to prove these invoices. Another thing which is worth noticing is that allegedly, these invoices were issued on the same date but the invoice exhibited as CW1/D bears 4.9.2003 as the date on it, whereas other invoices bore date of 4.8.2003. Furthermore, the genuineness of these invoices is in dispute as the relevant book from which the loose sheets of these invoices were taken was not brought on record. From the above discussion, the position of law which emerges is that once the holder of the

cheque received the cheque of the nature mentioned in Section 138 of the N.I. Act, the presumption u/s 139 would arise that it is for the discharge, in whole or in part, or any debt or other liability. But, such a presumption is rebuttable and the accused can prove the non-existence of any debt or other liability by raising a probable defence or by demolishing or discrediting the case of the complainant in cross-examination of witnesses adduced by the complainant.

11. In the instant case, in view of the foregoing discussion, it is explicitly clear that the presumption u/s 139 of the N.I. Act is rebutted from the evidence of the complainant, itself.

12. The complainant could not prove the existence of any debt or other liability of the accused and, thus, the accused cannot be held liable.

13. Since, the complainant could not overtly prove the culpability of the accused, the leave to appeal is liable to be dismissed and the impugned order of acquittal of the accused is upheld.