IN THE HIGH COURT OF MEGHALAYA AT SHILLONG

: JUDGMENT :

CRL.A. NO. 1 OF 2016

M/S Kim Hyundai	**::**	**Petitioner**
Versus		
Shri Sumo Singh	**::**	**Respondent**
Date of Judgment	**::**	**19.12.2017**

HON'BLE THE CHIEF JUSTICE SHRI DINESH MAHESHWARI

Shri MF Qureshi, for the appellant.

Shri S Jindal, for the respondent.

BY THE COURT:

By way of this appeal under Section 378 (4) read with Section 372 of the Code of Criminal Procedure, 1973, the complainant/appellant has challenged the judgment and order dated 23.12.2015 in CR Case No. 586 (S) of 2005 whereby, the Chief Judicial Magistrate, Shillong ['CJM'] has acquitted the respondent of the charges under Sections 138/142 of the Negotiable Instruments Act, 1881 ['the NI Act'] and Sections 420/406 of the Indian Penal Code ['IPC'].

The complainant, said to be the authorized dealer of Hyundai India Limited and having its showroom at Police Bazar, Shillong, filed the complaint case aforesaid while stating that a cheque issued by the accused/respondent in its favour for a sum of Rs. 4 lakhs towards credit purchase of one Santro Hyundai vehicle on 20.11.2004 was returned unpaid by the Bank for want of sufficient funds in the account; and that the accused/respondent failed to make payment despite notice. The defence of the accused/respondent had been that the cheque in question was forcibly obtained by the complainant and else, as against the purchase of the vehicle in question, the actual purchaser had indeed made the

payment including a sum of Rs. 4 lakhs by way of a demand draft. The learned CJM, after analysis of the evidence adduced by the parties, has accepted the defence version and has held that the complainant had failed to establish the existence of any debt or liability related with the cheque in question.

In view of the respective stand of the parties and the contentions urged in this appeal, the background aspects could be noticed in brief and to the extent relevant for the present purpose. The contents of the complaint, carrying the assertion on the part of the complainant, which formed the basis of imputations against the respondent, could be noticed as under:-

> *"1. That the Complainant is a Authorised Dealer of Hyundai Motor India Ltd. having Show Room situated at Salonsar Mansion, Police Bazar, Shillong – 793 001, District East Khasi Hills, Meghalaya within the jurisdiction of this Hon'ble Court.*
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> *2. That the Accused Person purchased on Credit one Santro Hyundai – Model New Santro XS, VD bearing Chassis No. MALAC514R4M550922, Engine No. G4HD4E42591 for Rs. 4,00,000/- (Rupees Four Lakhs Only) from the Complainant on 20-11-2004.*
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> *3. That the Complainant delivered the said Santro Hyundai on 20-11-2004 and the Accused Person paid a sum of Rs. 4,00,000/- by cheque bearing No. 359058 dated 22-11-2004 of State Bank of India, Paona Bazar Branch – 7440 (Imphal) .*
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> *(Photo copy of Cheque No. 359058 dated 22-11-2004 is enclosed as Annexure – I)*
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> *4. That the Accused Person entered into an Agreement for the said purchase and an Agreement was executed between the Complainant and the Accused Person on 22-11-2004 wherein the Accused Person undertakes that in case the Cheque issued by him is dishonoured then he shall be liable and prosecuted under The Negotiable Instrument Act.*
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> *5. That the Complainant presented the said cheque for encashment through his banker Bank of Baroda, Shillong Branch, however, the said cheque were returned by the banker of the Accused unpaid with a remark " Insufficient Fund".*
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> *5. That the Complainant informed the Accused about the fate of the aforesaid cheques bounced on presentation, however, on assurance given by the aforesaid the said cheques was again presented, but the same was returned unpaid with the same remark for the second time.*

6. That the Complainant again informed the Accused about the dishonor of cheque aforesaid and requested to pay a sum of Rs. 4,00,000/- only being the amount of bounced cheque aforesaid, however, the Accused expressed his regret and gave full assurance for third time to the Complainant that if the cheque was presented it would be cleared.

7. That the Complainant on good faith and keeping in mind the assurance given by the Accused, presented the aforesaid cheque for encashment through his banker Bank of Baroda, Shillong Branch, however, to the utter surprise and dismay of the Complainant, the aforesaid cheque returned unpaid by the Banker of the Accused for the third time, since the same was returned by the Banker of the Accused with the remarks "Insufficient of Fund" the intimation relating to the dishonor of the aforesaid cheques was received by the Complainant on 10-05-2005.

(Photo copy of Bank Intimation dated 10-05-2005 is enclosed herewith and marked as Annexure – III & III (a)

9. That within a period of 15 days of the receipt of the information from the bank relating to the return of the aforesaid cheques as unpaid, the Complainant sent a Notice dated 12-05-2005 by way of registered post with A/D to the Accused Person bringing to his knowledge about the dishonor of the said cheque on account of insufficiency of funds and requested the Accused to make the payment within 15 days of the receipt of the said Notice.

(Photo copy of Notice dated 12-05-2005 and Postal Receipt No. EE854934100IN dated 12-05-2005 are enclosed herewith and marked as Annexure – IV & V)

10. That the Accused has failed to make the payment under the said cheque and this has been done mala-fidely, intentionally, deliberately and knowingly and at the same time when the cheque was issued, the Accused knew the fate of the cheque that they would be dishonoured on account of insufficiency of funds.

(Photo copy of Envelope, refusal is enclosed and marked as Annexure – VI)

11. That by the aforesaid act, the Accused has become liable to be prosecuted under the provisions of the Negotiable Instruments Act, 1981 and under the provisions of the Indian Penal Code, 1881.

12. That the Complaint has been filed within the limitation period as provided for under the Act and the cheque was issued and dishonoured within the jurisdiction of this Hon'ble Court, this Hon'ble Court can take cognisance of the offence as committed by the Accused. The Accused has also committed offence U/s. 420 / 406 IPC."

It may be observed at this juncture itself that the particulars of Chassis Number and Engine Number do carry relevance for the purpose of

identity of the vehicle involved in the dispute. However, there had been an error in the complaint as regards the Chassis Number of the vehicle, as noticed during the course of hearing of this appeal. It is noticed that in the complaint, the Chassis Number of the vehicle in question was stated as 'MALAC514R4M550922', but the correct Chassis Number had been 'MALAC51HR4M550922'. Thus, the numeral '4' in the middle of this Chassis Number, after the numeral '51' and before the letter 'R' had been wrong and in fact, it should have been the letter 'H', as is found in the Bill as also the Delivery Receipt of the vehicle in question. In any case, there had not been any discrepancy about the Engine Number. Thus, the facts regarding the Chassis Number and the Engine Number, wherever occurring, shall be of reference to the correct numbers as indicated above.

After the initial proceedings of examining the complainant and taking of cognizance etc., the charges were framed against the respondent on 16.12.2010 by the learned CJM for offences under Sections 138/142 NI Act and also under Sections 420/406 IPC to which, the accused/respondent pleaded not guilty. The complainant examined 4 witnesses in the oral evidence apart from exhibiting 10 documents (Exhibits 1 to 9 and Exhibit S). On the other hand, the accused examined 3 witnesses including himself and exhibited about 17 documents (Exhibits A to Q and Exhibits 10 and 11).

The learned CJM, after having heard the parties, framed the points arising for determination in the case as follows:-

> *"**POINTS FOR DETERMINATION:***
>
> *14. From the above provision of law, the following points come up for determination before the court:*
> *(a) Whether the accused issued cheque bearing no 359058 dated 22.11.2004 drawn on State Bank of India, Paona Bazar Branch - (Imphal) for Rs. 4,00,000/- (Rupees four lakhs) only?*

(b) Whether the cheque was dishonoured?

(c) Whether there was any debt/liability arising out of the purchase of one Santro Hyundai Model New Santro XS, VD bearing Chasis No. MALAC514R4M550922, Engine No G4HD4E42591?

(d) Whether the accused has cheated the complainant and thus fraudulently or dishonestly induced him to deliver the Santro car?

(e) Whether the accused has committed criminal breach of trust?"

In the present case, in fact, the first two points aforesaid were rather formal in nature and else, it was not in dispute even on behalf of the accused/respondent that the cheque bearing No. 359058 dated 22.11.2004, drawn on State Bank of India, Poana Bazar Branch, Imphal for a sum of Rs. 4 lakhs was indeed issued by him; and this was also not in dispute that the said cheque was dishonoured for want of sufficient funds in the bank account of the respondent. The basic defence on the part of the accused/respondent had been that although the cheque in question was issued by him but there was no liability against the vehicle in question and in fact, the requisite payment was made by the actual purchaser by way of a demand draft. Therefore, the question essentially arising for determination in the present case had been at point (c), as regards the existence of debt/liability arising out of the purchase of the vehicle in question. The learned CJM, after analyzing the evidence of the parties including that of the actual purchaser, who was examined by the accused as DW2; and after examining the Delivery Receipt and the Bill concerning the vehicle in question (Exhibits 'O' & 'P'), accepted the case of the accused/respondent and held that the complainant had not been able to establish the existence of any debt/liability arising out of the purchase of the vehicle in question. The learned CJM concluded on point (c) as follows:-

"I have perused exhibit O and P which is the delivery receipt and Bill in respect of the vehicle bearing Chasis No. MALA C514R4M550922, Engine No. G4HD4E42591. Exh O and P are in respect of the same vehicle which the complainant claims that the accused had issued exh 1 i.e. cheque no. 359058 dated 22.11.2004 for a sum of Rs 4,00,000/- (Rupees four lakhs) only. As per exhibit O and P the said vehicle has been delivered to DW 2 Dr Balbina Sarangtham on 19.11.2004. The complainant has not disputed the payment made through demand draft No. 1204- 137325 in favour of Kim Hyundai by DW 2. I have also perused exhibit 3 which is dated 22.11.2004. As per exhibit 3 the vehicle bearing Chasis No MALA C514R4M550922, Engine No. G4HD4E42591 was delivered on 20.11.2004. The complainant in in evidence before this court has given different versions of the date of delivery of a vehicle. Moreover, complainant has admitted that the Engine No. and Chasis No. in exhibit 3 were filled up on 28/11/2004 after about 5 (five) days of the execution of exh 3. It is evident from the evidence of DW 2 that payment in respect of the vehicle delivered to her, which is also the same vehicle which the complainant states that the accused has issued the cheque in question, was made through demand draft and the complainant has not refuted the same. Moreover, the evidence of the complainant- PW 2 cannot be relied upon as PW 2 admitted that exh 3 was signed on 22/11/2004 but the engine No. and Chasis No. were filled up only on 28/11/2004. The evidence of PW 2 is found unreliable. Moreover, the complainant has not been able to refute the evidence of DW 2 with regard to the payment made in respect of the car delivered to her and is the subject matter of the cheque in question by demand draft. Moreover the complainant by admitting that ext 3 was executed on 22.11.2004 and the engine No and chasis No were entered on 28.11.2004 goes to show that there was alteration in the original content of ext 3 and thus cannot be relied upon.

From the evidence before this court, the complainant has not been able to establish the existence of any debt/liability arising out of the purchase of one Santro Hyundai Model New Santro XS, VD bearing Chasis No MALAC514R4M550922, Engine No G4HD4E42591. Hence this point needs to be decided in the negative."

After the findings aforesaid, the learned CJM further indicated that the complainant had not adduced any evidence that the accused indulged in cheating or breach of trust and proceeded to acquit the accused/respondent, as noticed at the outset.

Questioning the judgment and order aforesaid, the learned counsel for the appellant has strenuously argued that in this matter of complaint under Section 138 of the NI Act, the Court was required to presume that the holder of the cheque in question i.e., the appellant received the same from the respondent in discharge of a debt/liability. Learned counsel would further submit that though the presumption is rebuttable but burden of such

rebuttal had been only on the accused/respondent, who had failed to discharge this burden; and there had been major contradictions in the statement of the accused. The learned counsel has further submitted that the defence could not bring forth any major or material contradictions in the evidence of the complainant and nothing could be established that the payment was made for the purchase of the vehicle in question; and that the document Ext. Q was not reflective of payment towards the vehicle in question and reliance on the same was not justified.

The learned counsel has yet further submitted that the Trial Court has relied on the documents Ext. O and Ext. P but has failed to consider that the appellant was never confronted with these documents and hence, the same could not have been relied upon. Learned counsel would contend that the Trial Court has erred in picking up only some parts of the evidence and in not examining the evidence available on record as a whole and hence, the impugned judgment and order deserve to be interfered with. The learned counsel for the appellant also submitted that the accused had stated that he was forced and threatened to sign the agreement Ext.3 and also to issue the cheque Ext.1 but in the cross-examination, admitted that he did not take any steps/precaution after issuing the cheque in favour of the complainant/appellant. According to the learned counsel, the presumption in favour of the complainant/appellant still subsists and is not rebutted in the present case. The learned counsel has, therefore, prayed for conviction of the accused under Section 138 NI Act. As regards the charges under Sections 420/406 IPC, the learned counsel has submitted that admittedly the accused had not taken any steps for cancellation or nullifying the said documents executed by him and hence, he cannot be said to have carried out the proceedings in good faith.

Per contra, learned counsel for the accused/respondent has duly supported the impugned judgment with the submissions that the presumption of existence of liability was duly rebutted by the respondent by way of direct evidence of payment for the vehicle in question and hence, the appeal deserves to be dismissed.

Having given thoughtful consideration to the rival submissions and having examined the record, this Court is clearly of the view that this appeal remains bereft of substance and no case for interference is made out.

The basic facts in this matter, that the accused/respondent indeed issued the cheque bearing No. 359058 dated 22.11.2004 drawn on State Bank of India, Poana Bazar Branch, Imphal in favour of the appellant for a sum of Rs. 4 lakhs; and that the said cheque was returned unpaid by the banker for insufficiency of amount of money standing to the credit of the respondent are not in dispute. This is also not in dispute that the appellant had been the payee of the cheque in question and the respondent did not make any payment despite notice. Thus, the basic ingredients of Section 138 of the NI Act stand established and need no elaborate discussion. There cannot be any dispute on the further submission on behalf of the appellant about the presumption in law that the appellant received the cheque from the respondent for discharge of debt/liability. However, such a presumption is a rebuttable one, as is evident from Section 139 of the NI Act that reads as under:

> *"**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."*

The law remains settled that the burden to rebut the presumption under Section 139 *ibid.* is on the accused, but this burden on the accused is not of the similar nature as that on the prosecution for a criminal case, where the prosecution is required to prove the case beyond reasonable doubt. In other words, to rebut the statutory presumption that the cheque was for discharge of debt/liability, the accused is not expected to prove his defence beyond reasonable doubt and the standard of proof is not so high as that on the prosecution. In the case of ***M/s. Kumar Exports v. M/s. Sharma Carpets: AIR 2009 SC 1518,*** the Hon'ble Supreme Court expounded on these principles in the following:-

> *"11. ..... The accused in a trial under Section 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. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case*

and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

Thus, what was required of the accused in the present case for the purpose of rebutting the presumption under Section 139 of the NI Act was to lead cogent evidence and to show that there was no debt/liability referable to the cheque in question. Therefore, the basic question calling for determination in the present case is as to whether the preponderance of evidence on record, and the circumstances taken together, lead to the rebuttable of presumption of Section 139 of the NI Act?

As noticed, it had been the specific case of the appellant that the respondent purchased a particular Santro Hyundai vehicle bearing Chassis No. MALAC51HR4M550922 and Engine No. G4HD4E42591; and that the cheque in question was given by the respondent towards this vehicle. It has been established on record, particularly by way of the Delivery Receipt (Ex. O) and the Bill (Ex. P) that in fact, the said vehicle bearing Chasis No MALAC51HR4M550922 and Engine No. G4HD4E42591 was purchased by one Dr. Babina Sarangtham, who was examined by the accused/respondent as DW2 in the trial. The said witness categorically stated as under:-

"Presently I am attached with the Regional Institute of Medical Sciences (RIMS), Imphal as an Asstt. Professor Deptt of Pathology since Feb. 2000. I know the accused. Shri Sumo Singh. I came in contact with the accused Shri Sumo Singh in the year 2004 as I wanted to purchase a car. In the year 2004 I intended to buy a car and on 25/11/2004 I got the delivery of Hyundai Santro Xing XS which was delivered by the accused Shri Sumo Singh. On being shown Ext-O I state that the same is the delivery receipt dated 19/11/2004 in respect of the said car and Ext-O(1) is my signature. On being show Ext-P I state that it is a bill dated 19/11/2004 in respect of the said car and Ext-P(1) is my signature. I made the payment through demand draft which was prepared at the SBI, Paona Bazar, Branch, Imphal for an amount of Rs. 4 Lakhs. The demand draft was prepared by the accused in my presence as I accompanied him. On being shown Ext-10 I state that it is the demand draft which the accused had prepared in my presence and the said Ext-10 was prepared for the purchase of the said car in my favour and I state that the accused had purchased the said

car and handed the delivery of the said car to me at Imphal on 25/11/2004."

The said witness was duly cross-examined on behalf of the complainant; and she stated in the cross-examination as under:-

"I have purchased the aforesaid car from the accused person from Imphal and the payment thereof against the said car was made from Imphal to the accused. The cost of the said car was 4.10 Lakhs Approx. I have paid Rs. 4 lakhs by demand draft and the remaining Rs. 10,000 Approx by cash. I heard the accused person was the sub dealer under the complainant. I have heard that the payment of my vehicles was not made by the accused person. Whatever I have deposed before the court is within my personal knowledge. I put my signatures in Ext-O & P in Imphal."

It had been the specific case of the complainant that the cheque in question was given towards purchase of the particular vehicle whose Chassis Number and Engine Number were stated in the Complaint and the same particulars (with typographical errors) were repeated in the notice demanding payment too (Ex.6). When it is proved unfailingly on record that the vehicle of the given particulars was purchased only by DW2 Dr. Babina Sarangtham, who made the payment of a sum of Rs. 4 lakhs towards the vehicle by way of a demand draft and the other amount was paid in cash; and the complainant has not been able to deny these facts, the preponderance of evidence leads only to the conclusion that as against the sale of the vehicle in question, the appellant had indeed received the payment from the actual purchaser. As a necessary corollary, the cheque in question cannot be said to have been issued by the respondent in discharge of the specific debt or liability as alleged in the complaint. It had not been the case of the complainant that there was any other debt or liability in the respondent, which was sought to be discharged by way of the cheque in question.

The submissions that the appellant was not confronted with the documents Exts. O and P do not make out any case for interference. In

fact, it is noticed that the document Ext. 11 i.e., Delivery Receipt of the vehicle in question is the same document, which was again marked as Ext. O in the evidence of the accused/respondent. The Managing Director of the Complainant himself admitted the document Ext. 11 in his cross examination while stating as under:-

> *"Ext-11 is the delivery receipt of the vehicle in question and the date of delivery of Ext-11 is 19/11/04."*

The document Ext. 'P' is nothing but the Bill relating to the same vehicle with the same particulars and duly drawn in the name of DW2 Dr. Babina Sarangtham, showing the showroom price for the vehicle at Rs. 4,10,672/-. Thus, it is established on record that the vehicle in question was indeed sold to DW2 Dr. Babina Sarangtham, who has specifically pointed out that the Demand Draft for a sum of Rs.4 lakhs was indeed prepared against the vehicle in question. The Demand Draft was duly paid on 22.11.2004, as per the certificate of the Bank (Ext. Q). Thus, the evidence on record further shows that the appellant had received the payment of a sum of Rs.4 lakhs against the vehicle in question by way of the Demand Draft.

Thus, the conclusion is irresistible that the amount represented by the cheque in question was indeed received by the appellant from the actual purchaser. This being the position, the cheque in question (Ext.1) as also the alleged agreement (Ext. 3) lost their value, worth and relevance; and it is difficult to accede any right to the appellant to receive the money represented by the cheque in question.

It appears from the evidence adduced on record and from the dealings of the parties that the accused/respondent had been working as an agent of the appellant in the State of Manipur through whom the

appellant was selling its vehicles to the customers. In those dealings, the respondent had executed certain agreements and had also issued the cheque so as to safeguard the interests of the appellant but such issuance of cheque was otherwise not in discharge of any direct liability of the respondent.

In any case, so far the present matter is concerned, when the complainant/appellant itself made the specific claim that the cheque was issued towards purchase of a particular vehicle; and it is found that the said vehicle was in fact, purchased by DW2 and not by the respondent; and further when it is found that the said purchaser had made the payment, which was indeed received by the appellant, in the opinion of this Court, the respondent was able to rebut, effectively and conclusively, the presumption of Section 139 of the NI Act. On the other hand, the appellant had not been able to establish the existence of any other debt or liability in the respondent. Hence, the respondent cannot be held guilty of the offence under Section 138 of the NI Act. In the given set of facts and circumstances, neither any deceitful intent nor any breach of trust on the part of the respondent is seen in the matter. Thus, the charges as framed in this matter fall to the ground.

For what has been discussed hereinabove, this Court is satisfied that the Trial Court has rightly acquitted the accused/respondent in this matter and the judgment and order impugned call for no interference.

Accordingly, the appeal fails and is dismissed.

CHIEF JUSTICE

Sylvana

Item No.