* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 08.04.2024
% Pronounced on : 30.04.2024

+ CRL.M.C. 8317/2023, CRL.M.A. 30952/2023
CRL.M.C. 8360/2023, CRL.M.A. 31206/2023
CRL.M.C. 8377/2023, CRL.M.A. 31247/2023, CRL.M.A. 31248/2023
CRL.M.C. 8383/2023, CRL.M.A. 31265/2023, CRL.M.A. 31266/2023
CRL.M.C. 8385/2023, CRL.M.A. 31274/2023, CRL.M.A. 31275/2023
CRL.M.C. 8387/2023, CRL.M.A. 31279/2023, CRL.M.A. 31280/2023
CRL.M.C. 8388/2023, CRL.M.A. 31283/2023, CRL.M.A. 31284/2023
CRL.M.C. 8416/2023, CRL.M.A. 31419/2023

M/S KELTECH INFRASTRUCTURE LTD. ..... Petitioner
Through: Mr. Niraj Kumar Sharma, Advocate.

versus

MS DEEPA CHAWLA ..... Respondent
Through: Mr. Anil Kaushik, Sr. Advocate with Mr. Arun Vohra, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

At the outset, learned counsel for the petitioner prays that though the present petitions have been filed under Section 482 Cr.P.C., however, considering that the same have been filed against the order of Appellate Court, the same be considered as revision petitions filed under Section 397

read with Section 401 Cr.P.C. Ordered accordingly. Registry is directed to take appropriate steps.

CRL.REV.P. (to be numbered), CRL.M.A. (to be numbered)

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CRL.REV.P. (to be numbered), CRL.M.A. (to be numbered), CRL.M.A. (to be numbered)

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1. By way of present petitions, the petitioner seeks to assail the distinct judgements all dated 09.10.2023 passed by learned Sessions Court, Saket in Criminal Appeals filed by the petitioner (alongwith the other co-accused) being CRL.A. Nos. 15-22/2023 whereby judgment of conviction dated 25.11.2022 and order on sentence dated 12.12.2022 passed by the Trial Court in complaint case arising out of Section 138 read with Section 141 NI Act came to be upheld.

2. Pertinently, the present petitions have been filed pertaining to the proceedings initiated under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereafter, the *'NI Act'*). Except for the cheque numbers, the facts as well as the parties to the matter being common,

the above-noted petitions are taken up for consideration together and disposed of vide this common judgment.

3. It is to be noted that apart from the cheque details, rest of the facts involved in all the Appeals remain the same. The facts, as noted in one of the said Appeals are as under:-

> *"2. In a nut shell, the facts of the case are that respondent/complainant Deepa Chawla agreed to purchase three flats - (i) K-1409 for Rs.33.50 lakh, (ii) K-1410 for Rs.33.50 lakh and (iii) K-1408 for Rs.33 lakh, in a multi storey building being constructed by accused company (appellant no.1 herein) at its Plot No. 6, Block K-1, GH, in the project named as 'Kumar Golf Vista' at Crossing Republik, NH-24, Ghaziabad, U.P. and executed three separate agreements, all dated 05/09/2013. The total sale consideration of Rs.1 crore was paid by complainant to accused no. 1 company. In pursuance thereof, accused no.1 company entered into another agreement dated 06/09/2013, as per which, if accused no. 1 company failed to complete the construction or to handover the peaceful and physical possession of the flats in question, it would purchase them back from complainant at the agreed predetermined composite sale consideration of Rs.1 crore. In order to show his bonafide intention, accused Narinder Kumar (appellant no.2 herein), the Director of accused no. 1 company, issued post-dated cheque bearing no.150474 dated 06/09/2015 of Rs.1 crore to complainant.*
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> *3. As it transpired, accused no.1 company (appellant no.1 herein) could not complete the construction by the due date of 06/09/2015, neither refunded the sale consideration amount to complainant. Through communication dated 01/09/2015, the accused company sought extension of time till 06/09/2016 to complete the construction and to deliver the flats. Through communication dated 02/09/2015, complainant granted the accused further extension of 12 months, upto 06/09/2016 but requested for replacement of cheque no. 150474 dated 06/09/2015 with fresh cheque. In furtherance of their mutual*

communication, accused no. 1 company, vide communication dated 03/09/2015, issued fresh post dated cheque bearing no. 245414 dated 06/09/2016 in the sum of Rs.1 crore to complainant. In the communication dated 03/09/2015, the accused company agreed to pay interest @ 24% per annum on refundable amount in the event of failure to deliver the flats by the end of extended time. As a security towards payment of interest, accused no. 1 company issued 12 post-dated cheques bearing no. 245401 - 245412 from date 06/10/2015 to 06/09/2016 of Rs.2 lakh each to the complainant.

4. Thereafter, accused no. 1 company replaced cheques bearing no. 245406, 245407 and 245408, and issued fresh cheques bearing no. 307218, 307222 and 096188, all dated 26/07/2016 to complainant, through communication dated 27/07/2016. In addition, cheque bearing no. 245409 was also replaced with cheque no.329348 dated 06/09/2016 vide communication dated 06/09/2016.

5. It is not in dispute that the cheque in question i.e. cheque no. 245411 dated 06/08/2016 in the sum of Rs.2 lakh handed over by accused no. 1 company to complainant got dishonored with remarks 'Insufficient Funds' vide cheque return memo dated 13/10/2016."

4. In the present revision petitions, the petitioner has confined its submission on following two aspects.

Firstly, it was contended that the respondent being the drawee of the impugned cheque neither filed the complaint in question nor appeared before the Trial Court in the proceedings. The complaint was preferred and proved by one *Mr. Ajay Chawla*, Power of Attorney of *Ms. Deepa Chawla*/respondent. Both the Trial Court as well as Appellate Court erred in not appreciating the fact that the attorney holder, having no personal knowledge of material averments, could not have deposed on behalf of the complainant/respondent. In support of the said submission, reliance has been

placed on the decisions in Janki Vashdeo Bhojwani & Anr. V. Indusind Bank Ltd. & Ors.[1], A.C. Narayanan v. State of Maharashtra & Anr.[2] and TRL Krosaki Refractories Limited v. SMS Asia Private Limited & Anr.[3]

Secondly, it was contended that both the Courts below have failed to appreciate that the petitioner was able to successfully rebut the presumption raised under Section 139 of the NI Act and as such the conviction is liable to be set aside. In this regard, reliance has been placed on G. Vasu v. Syed Yaseen Sifuddin Quadri[4].

5. The first contention of the petitioner that in light of Section 145, the complainant/*Deepa Chawla* ought to have appeared and deposed before the Trial Court personally, is misconceived. There is no cavil with the proposition of law, as laid down in A.C. Narayanan (Supra) that attorney holder can depose and verify on oath before the Court, in order to prove the contents of the complaint. In the said judgement, it was categorically observed that the attorney holder may be allowed to file, appear and depose for the purpose of section 138 NI Act if he has knowledge about the transaction and can bring on record the truth of the grievance/offence. In this regard, it is worthwhile to note that in the cross-examination of *Ajay Chawla*, attorney holder, no suggestion was put to him that he had no personal knowledge of the facts and could not have deposed before the Court and thus, the petitioner failed to give any suggestion.

Coming to the second contention that the petitioner was able to rebut the presumption, it is noted that neither the petitioner filed any document in

[1] (2005) 2 SCC 217
[2] (2014) 11 SCC 790
[3] (2022) 7 SCC 612
[4] AIR 1987 AP 139

support of its defense nor led any evidence. Further, no material contradictions was brought to light in the complainant's case, during the cross examination of *Ajay Chawla*. It is also pertinent to note that in the trial, the petitioner Nos. 1 and 2 had pleaded guilty. However, petitioner No.2/*Narinder Kumar* preferred an appeal in which he was permitted to withdraw his plea of guilt, however petitioner No.1/*M/s Keltech Infrastructure Ltd.*, being the accused company did not file any such appeal.

6. Section 139 of the NI Act stipulates that "unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for discharge of, whole or any part of the liability". The same is a presumption of law and the use of the words "shall presume" makes it obligatory upon the Court to raise the presumption in cases wherein the fact for raising the said presumption are established, however, the same is a rebuttable presumption

The Supreme Court has time and again dealt upon the aspect of presumption of Section 139 NI Act. Recently in Rajesh Jain *v.* Ajay Singh[5], the Supreme Court observed as under:-

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> *37. As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.*

[5] (2023) 10 SCC 148

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39. The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of "preponderance of probabilities", similar to a defendant in a civil proceeding. [Rangappa v. Sri Mohan]

40. In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words "unless the contrary is proved" occurring in Section 139 does not mean that the accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist. [Basalingappa v. Mudibasappa; see also Kumar Exports v. Sharma Carpets]

41. In other words, the accused is left with two options. The first option—of proving that the debt/liability does not exist—is to lead defence evidence and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case. The preponderance of probability in favour of the accused's case may be even fifty-one to forty-nine and arising out of the entire circumstances of the case, which includes: the complainant's version in the original complaint, the case in the legal/demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his Section 313 Cr.P.C. statement or at the trial as to the circumstances under which the promissory note/cheque was executed. All of them can raise a preponderance of probabilities justifying a finding that there was "no debt/liability" [Kumar Exports v. Sharma

Carpets]

42. The nature of evidence required to shift the evidential burden need not necessarily be direct evidence i.e. oral or documentary evidence or admissions made by the opposite party; it may comprise circumstantial evidence or presumption of law or fact.

43. The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift to the complainant. It is open for him to also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact…

44. Therefore, in fine, it can be said that once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption "disappears" and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his complaint case. Thereafter, the presumption under Section 139 does not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. [Basalingappa v. Mudibasappa; see also, Rangappa v. Sri Mohan]

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7. Considering the factual matrix and the legal position enumerated above, it can be observed that to rebut the presumption under Section 139 NI Act, the accused has to provide cogent evidence to show that the

debt/liability did not exist. Admittedly, the issuance of cheque is not disputed. Moreover, in the present case, the petitioner did not file any document or led any evidence in support of its contention. Another way to rebut the presumption is to show that no debt/liability existed by way of preponderance of probability, through the facts and circumstances of the case. However, the petitioner failed to even achieve this threshold. Neither in the facts pleaded by the petitioner nor in the cross-examination of Ajay Chawla, a copy of which has been placed on record, any fact was brought on record which would tilt the scales of probability in favour of the petitioner. Thus, the petitioner failed to provide any evidence/fact to support its case.

8. Considering the aforesaid as well as the fact that the two courts below have returned concurrent finding on the facts of the case, and in the absence of any cogent evidence/fact being brought to the notice of this Court warranting its interference, I am of the considered opinion that the said petitions must fail. Resultantly, the petitions alongwith pending applications are dismissed.

9. A copy of the order be communicated to the concerned trial court.

MANOJ KUMAR OHRI
(JUDGE)

APRIL 30, 2024
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