$~1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26.11.2020
Pronounced on: 04.12.2020

\+ CRL.M.C. 1977/2020 & Crl.M.A. 14157-59/2020

RAJESH KUMAR ..... Petitioner

Through Mr.Rajesh Kumar, Adv.

versus

MEHROTRA IMPEX PVT. LTD. ..... Respondent

Through Mr.Nishant Nigam, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Present petition has been filed under section 482 Cr.P.C. read with Article 227 of the Constitution of India praying as under:

i. Call the Trial Court Records of CT case No.619030/2016 (CNR-DLSE020002882011) decided by Ms.Vasundhra Azad, learned MM-03, South East District, Saket Courts as well as execution petition no.617/2017 (CNR-DLWT010054062017) pending before Shree Vikash Dhull, learned ADJ-01/West District/Tis Hazari Courts, Delhi;

ii. Issue an order thereby all the pending/decided matters between

the parties may be clubbed together so as a common compounding order.

iii. *Issue an order thereby directing the petitioner to pay to the respondent the judicious/reasonable amount within certain period of time keeping in view the fact and circumstances of the present case;*

iv. *Further the order dated 15.05.2019 and 25.05.2019 passed by the learned Magistrate court may be vacated. The judgment dated 27.02.2020 passed by learned ADJ*-04, South East court may also be set aside. Further the execution proceedings in execution petition no.617/2017 may be recalled.

2. Brief facts of the present case, as narrated in the present petition, are that in 2010, the petitioner was running a small garment factory. Since around 2009, he was dealing with the respondent. Lastly during 15.11.2010 to 29.12.2010, he had purchased some fabric materials from the respondent on credit basis, upon certain terms and conditions. Respondent issued seven invoices of different amounts for the material purchased during 15.11.2010 to 29.12.2010. In the first week of July, 2011, final account has been mutually settled between the parties and therefore eight cheques (without

mentioning dates) having total value of Rs.17,68,000/- were handed over to the respondent. The petitioner had offered these cheques for securing the debt of the respondent. Petitioner had promised to pay part payments time to time. The respondent had assured that after receiving all the due outstanding payments, all the eight undated security cheques would be returned back to the petitioner. Immediately thereafter, in the last week of July, 2011, against the total liability of Rs.17,68,000/-, as promised, the petitioner had made a part payment of Rs.2,00,000/- to the respondent. This part payment of Rs.2,00,000/- was made on 22.07.2011 through pay order. The said payment was made against running account and on 19.04.2014, the AR of respondent had admitted the said fact before the learned Trial Court. The payment was not made against any particular cheque, in fact, it was made against all the deposited cheques. Therefore, after making the part payment of Rs.2,00,000/-, the total outstanding dues/liability of the petitioner had been reduced to the amount of Rs.15,68,000/-. On 19.04.2014, AR of the respondent clearly admitted that the final debit balance was Rs.15,68,000/-. However, on 11.08.2011, the respondent had issued legal notice under section 138 of N.I. Act, demanding total amount of Rs.17,68,000/- from the petitioner. But the respondent did not

discuss/disclose maliciously anything about receiving a part payment of Rs.2,00,000/- on 22-23.07.2011. Whereas in its reply dated 31.08.2011, the petitioner had clearly mentioned that against the total outstanding amount of Rs.17,68,000/-, he had already made a part payment of Rs.2,00,000/- through pay order no.000878 dated 22.07.2011.

3. Learned counsel for the petitioner has submitted that on 31.08.2011, the petitioner had specifically offered to make remaining outstanding amount of Rs.15,68,000/- to the respondent. However, the petitioner had requested for some time for making the remaining payments. But the respondent/complainant with malafide intention was demanding much excess amount than the actual existing liability. Despite on 31.08.2011, the petitioner had offered to pay the actual payable amount. The respondent did not even bother to response to the reply dated 31.08.2011 of the petitioner. Finally the respondent has filed complaint under section 138 of N.I. Act before the learned Magistrate against the petitioner.

4. Further submitted that in its complaint as well as pre and post summoning evidence, the respondent intentionally did not discuss anything about receiving of an amount of Rs.2,00,000/- after receiving the eight cheques. In its complaint and evidence, the respondent had claimed the total

liability of the petitioner as Rs.17,68,000/-.

5. Learned counsel further submitted that before serving the notice under section 251 of Cr.P.C. by learned Magistrate, the petitioner had filed his settlement proposal in terms of *"Damodar S. Prabhu"* guidelines of the Hon'ble Supreme Court and offered before the court to pay the actual outstanding amount, even something more. Therefore, on 02.03.2013, he had clearly offered to pay the amount of Rs.16,00,000/- in installments, but refused to pay illegally demanded amount, because he had already paid a part payment of Rs.2,00,000/- after drawing/giving his cheques to the respondent/complainant. Moreover, through settlement application, on 02.03.2013, the petitioner had apprised his defense before the learned Magistrate, however, on the same day, the settlement application was heard and notice under section 251 of Cr.P.C. was served and thereto petitioner had pleaded not guilty since he was not liable to pay excess amount. So ultimately the trial started, wherein, the petitioner was supposed to prove preponderance of probability that at the time of legal notice, the actual *"legally enforceable debt"* was Rs.15,68,000/- and all the cheques (total value of Rs.17,68,000/-) were deposited for security purposes.

6. It is submitted by learned counsel for the petitioner that during trial

application under section 145(2) of N.I. Act was allowed, therefore, the AR/ Director of the complainant was called for his cross examination. During cross examination, on 19.04.2014, the AR/Director of the respondent admitted that one payment of Rs.2,00,000/- was received by him on 23.07.2011. Immediately thereafter, he made his voluntarily statement saying that the payment was received against running account. But he did not say that the payment was received against any particular cheque, out of eight cheques. He clearly admitted that he would have to check why a sum of Rs.17,68,319/- was demanded from the petitioner in the legal demand notice. The amount of Rs.15,68,319/- was the final due amount as the invoices have been raised even after 29.12.2010. Thereafter on 26.07.2014, the statement of the petitioner was also recorded under section 281 of Cr.P.C.; on 09.09.2014, defense evidence was recorded; both defense witnesses had recorded the same defense that the petitioner had already paid a part payment of Rs.2,00,000/- to the respondent. In addition, on 09.09.2014, the petitioner had made his statement before learned Magistrate that *"I had made payment of Rs.2,00,000/- by way of pay order which was against the cheques in question issued to the complainant".* On 16.10.2014, the petitioner had filed an application under section 311 of Cr.P.C. seeking

permission for producing statement of account regarding pay order dated 22.07.2011. The same had been dismissed with the order quoted as *"Perusal of record shows that the complainant during cross examination has admitted payment of Rs.2,00,000/- made on 23.07.2011. Since the fact of receipt of payment is admitted, the application for recalling of witness is dismissed."*

7. Further submitted, with the indulgence of learned Magistrate, several times, the petitioner had tried his best to settle the matter. But because of the *"disputed"* part payment of Rs.2,00,000/-, the matter could not be settled even through mediation. In the meantime, the respondent had filed a civil suit i.e. CS(OS) No.2379/2013 before this Court on the basis of the said eight cheques praying for recovery of Rs.29,38,481/- from the petitioner. However, the petitioner had put his same submissions before this Court that the actual legally enforceable debt was Rs.15,68,000/- and not Rs.17,68,000/-. He submitted bonafidely before this Court that he was always ready and willing to pay the amount of Rs.15,68,000/- along with reasonable interest in installments, which was appreciated and, therefore, on 29.01.2015 directed the petitioner to pay the total full and final settlement amount of Rs.20,00,000/- to the respondent in 40 installment of Rs.50,000/-

per month. So therefore by 30.04.2018, the petitioner was supposed to pay total decreed amount of Rs.20,00,000/-.

8. Accordingly, the petitioner had started to pay Rs.50,000/- in each and every months. However, his financial position was not good. But he was trying his best for abiding the order of this court. By October, 2016, he had paid 16 installments for a total amount of Rs.8,00,000/- to the respondent.

9. It is submitted that vide order dated 29.01.2015, this Court had also put a condition quoted as *"In case of three consecutive defaults by the defendant (petitioner herein), the entire decretal amount shall become payable alongwith interest @ 12% p.a. from the date of filing of suit i.e. 20.11.2013"*. This Court had also given liberty to the respondent to restart criminal prosecutions under section 138 of N.I. Act before the Magistrate Court, in the event of three consecutive defaults. After paying Rs.8,00,000/- to the respondent, by the middle of 2016, the petitioner had made three consecutive defaults due to his extreme financial hardship but not intentional. However, he was committed and willing to make all the rest payments till 30.04.2018 (within 40 months). Several times, the petitioner had made submissions before the learned Magistrate that he was willing to pay rest of the installment, but due to acute financial hardship he could not

make payment on time. On 03.03.2007, the petitioner had made his submissions before the learned Magistrate that he has already paid Rs.8,00,000/- out of Rs.20,00,000/- and was ready to make the payment by 30.06.2017 with respect to all arrears. Since respondent wanted to restart the prosecution proceedings against the petitioner, therefore, again re-started despite the fact that several times, the petitioner had requested the respondent for abeyance the criminal proceedings, so as he could again start to pay installments. The petitioner had continuously assured the respondent that he would make rest of the payment i.e. Rs.12,00,000/- till 30.04.2018, at any cost. But the respondent had started to demand full decretal amount of Rs.20,00,000/- along with 12% interest from 20.11.2013. So again no settlement could arrive between the parties.

10. Learned counsel for the petitioner submitted that finally vide order dated 15.05.2019, the learned Magistrate has held that at time of legal demand notice dated 11.08.2008, the legally enforceable debt/liability of the petitioner was Rs.15,68,000/- and not Rs.17,68,000/-. Therefore, the petitioner has been convicted, because he did not pay the amount of Rs.15,68,000/- to the respondent.

11. It is submitted that the petitioner was ready and willing to pay

Rs.15,68,000/- since 31.08.2011 but, respondent had never accepted the same because he was claiming for Rs.17,68,000/-. However, vide order dated 25.05.2019, the petitioner was awarded simple imprisonment of three months for the offence under section 138 of N.I. Act and also directed to pay fine of Rs.22 lacs. Being aggrieved, the petitioner had filed an appeal before learned Sessions Court but the same has been dismissed vide order dated 27.02.2020.

12. Lastly, learned counsel submitted that the petitioner may not be punished under section 138 of N.I. Act, because he had never refused to pay the actual legally enforceable debt amount. The respondent may not be allowed to take undue advantage by asking exaggerated amount under the guise of section 138 of N.I. Act. The said provision is not enacted for enriching the dishonest payee. The petitioner wants to pay appropriate and reasonable amount to the respondent, therefore, he is seeking indulgence of this court for securing the ends of justice.

13. In view of the facts and submissions made by the learned counsel for the petitioner, nothing can be granted in favour of the petitioner. Even, during arguments, this Court had put a specific query to the petitioner, who was present through video conferencing, that how and within how much

time he would like to pay the amount. He replied that he is in great financial crises, therefore, as and when money would come he will pay the amount. This type of vague statement cannot be accepted even if the court wants to help such a petitioner, so this Court is also helpless and decided to give opinion on merit and as per law.

14. The case of the respondent is that the petitioner and respondent had engaged in a business relationship where the respondent was selling Fabric to the petitioner. The petitioner was required to remit payments with regard to the purchase from the respondent and such payments were to be made against each invoice raised by the respondent. The petitioner instead of making payments against each invoice commenced making part payments and thus, a running account was maintained by the respondent with regard to the petitioner. At some point in the year 2010 the petitioner stopped making payments to the respondent. Therefore, various reminders were issued to the petitioner due to which the petitioner issued Eight Cheques for an amount of Rs.17,68,000/- (Rupees Seventeen Lakhs Sixty Eight Thousand Only) to the respondent. The said cheques were presented by the respondent with its bank, however, the same were dishonoured. In this regard, the respondent issued a legal notice to the petitioner apprising him of dishonour of the

cheques and also advised him to remit the payments due to the respondent. The petitioner while responding to the legal notice admitted his liability to the tune of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) approximately and committed to remit the payment over a period of 30 months. Since the payment was due on an immediate basis and that the assurances given by the petitioner were hollow in nature, the respondent proceeded to file a complaint under Section 138 of the Negotiable Instruments Act before the Learned Metropolitan Magistrate, Saket Courts, Delhi. The said proceedings lasted for more than 8 years and finally concluded on 25.05.2019 and vide order dated 15.05.2019 the petitioner was held guilty of offence under Section 138 of the Negotiable Instruments Act. Thereafter, the order of sentencing was passed vide order dated 25.05.2019 whereby the petitioner was directed to pay an amount of Rs.22,00,000/- to the respondent as compensation.

15. Learned counsel for respondent has submitted that during the pendency of the proceedings before the Learned Metropolitan Magistrate, the respondent had also filed a civil suit before this Court vide C.S. (OS) No.2379/2013. In the said civil suit the petitioner had arrived at an amicable settlement with the respondent to remit total amount of Rs.20,000,00/-

(Rupees Twenty Lakhs Only) to the respondent through equal monthly instalments of Rs.50,000/- commencing from January, 2015. Further, this Court had directed the petitioner that in case the petitioner is found defaulting on the instalments, for 3 consecutive times then the entire decretal amount shall be due alongwith interest @ 12% thereon and any amount already paid towards the said decretal amount shall stand forfeited. Furthermore, this Court had also directed that the respondent will also have the liberty to prosecute the complaint pending before the Metropolitan Magistrate.

16. Further submitted that during the pendency of the proceedings before the Learned Metropolitan Magistrate, the respondent abided by the directions of this Court in C.S. (OS) No. 2379/2013 and continue to remit an amount of Rs.50,000/- every month commencing from January, 2015. However, the petitioner after the month of July, 2015, started to default on his monthly instalment. Initially, the petitioner delayed payments only for a period of 2 months so as to not get covered under the ambit and scope of the directions of this Court with regard to the three consecutive defaults. However, subsequent to the month of September, 2015, the petitioner defaulted in paying the monthly instalments for a period of three consecutive

months. Even so the respondent allowed the petitioner to continue paying the equal monthly instalments yet the petitioner took the undue advantage of the leniency of the respondent and completely stopped paying the instalments after May, 2016. Since the petitioner had defaulted more than once with regard to three consecutive defaults the respondent was left with no other option but to proceed with the complaint pending before Learned Metropolitan Magistrate, Saket Courts, Delhi.

17. It is submitted that the Petitioner while remitting Rs.50,000/- per month as per the directions of this Court had remitted an amount of Rs.8,00,000/- (Rupees Eight Lakhs Only) to the Respondent. Further, It is imperative to mention that despite various opportunities given to the Petitioner, despite number of defaults, the Petitioner chose not to proceed further with the amicable settlement but chose to contest the complaint before the Learned Metropolitan Magistrate. Finally, vide judgment dated 25.05.2019, the petitioner was held guilty for the offence under Section 138 of the Negotiable Instruments Act and convicted with three months simple imprisonment and payment of Rs.22,00,000/- to be paid as compensation in favour of respondent.

18. Instead of complying with the order of conviction dated 25.05.2019,

the petitioner challenged the judgment dated 15.05.2019 before the Additional Session Judge, Saket Court, Delhi. However, the said appeal was also dismissed vide judgment dated 27.02.2020. Consequently, the matter is pending before the Learned Metropolitan Magistrate, for compliance of the Order of Conviction dated 25.05.2019. However, the petitioner has failed to appear and has been declared an absconder vide order dated 18.11.2020. Despite the above conduct of the Petitioner, in an audacious attempt the Petitioner has filed the present petition under Section 482 Cr.P.C. seeking compounding of the offence for which he has been convicted as also seeking other reliefs which are beyond the jurisdiction of this Court under the provisions of Section 482 Cr.P.C. In view of the above the present petition is liable to be dismissed since the Petitioner is not serious in complying with the directions of this Court passed in C.S. (OS) 2379/2013 or Order of the Learned Metropolitan Magistrate, Saket Courts. Delhi and has been avoiding the due compliance of such directions and further has been running away from the law.

19. I have heard learned counsel for the parties and perused the material available on record.

20. Vide the present petition under Section 482 Cr.P.C., the petitioner has

sought to combine the Civil Execution Proceedings pending before the Learned Additional District Judge, Tis Hazari Court, Delhi, and the criminal proceedings pending before the Learned Metropolitan Magistrate. The said reliefs cannot be granted since both proceedings are mutually exclusive and are pertaining to different reliefs since one is pending before the Additional District Judge for execution of the settlement decree dated 29.01.2015 and the other is before the Learned Metropolitan Magistrate for compliance of the order of conviction and which has been disposed of vide order 18.01.2020 whereby the petitioner has been declared an absconder after due procedure under Section 82 Cr. P.C. was followed.

21. The present petition is liable to be dismissed since the Petitioner has not come before this Court with clean hands especially as the Petitioner has defaulted on payments, eventually, it was required to make efforts to satisfy settlement decree dated 29.01.2015. The said settlement decree has attained finality and is liable to be complied with. Hence, the petitioner through the present petition cannot seek to override/appeal/modify the contents of the said Settlement Decree.

22. Moreover, the Petitioner has not shown any bonafides with regard to his conduct to arrive at an amicable settlement/compound the offence and

thus, the present Petition cannot be allowed since in a catena of judgments, the Hon'ble Supreme Court has held that the powers under Section 482 Cr.P.C. are to be used sparingly and in case the law provides for other provisions which can be applied for due delivery of justice then in that case Section 482 Cr.P.C. cannot be invoked to seek any relief. Hence, even in the present case, the petitioner without moving any Application and/or seeking any assistance from the Court of the Learned Metropolitan Magistrate or the Learned Additional District Judge in trying to either compound the offence or amicably settle the matter, has approached this Court under Section 482 Cr.P.C.

23. It is pertinent to mention here that in the statement of accused (petitioner herein) recorded under Section 313 Cr.P.C, he has admitted that he had issued the eight cheques in question to the complainant although the same were issued for security purposes since it was agreed between the respondent and petitioner that he would make all payments due to the complainant before December 2013. Further, the petitioner has stated that till 22.07.2011, he had paid approximately 16 lakhs through cheques and demand drafts.

24. For the offence under Section 138 N.I. Act, the presumptions under

Sections 118(a) and 139 have to be compulsory raised as soon as execution of cheque by accused is admitted or proved by the complainant and thereafter burden is shifted to accused to prove otherwise. These presumptions end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence but only makes a prime facie case for a party for whose benefit it exists. Presumptions both under Section 118 and 139 are rebuttable in nature as was held by the Hon'ble Supreme Court of India in ***Hiten P. Dalal v. Bratindranath Banerjee {(2001) 6 SCC 16}***.

25. It has been held in ***M/s Kumar Exports v. M/s. Sharma Carpets, {2009 A.I.R. (SC) 1518}*** that the accused may rebut these presumptions by leading direct evidence and in some 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. Further, the burden may be discharged by the accused by showing preponderance of probabilities and the onus on the accused is not as heavy as it is on the complainant to prove his case.

26. From the aforesaid discussion, it becomes amply clear that the

presumption of law, though rebuttable, works in favour of the complainant. However, the presumption gets rebutted if the defence raises a reasonable suspicion in the prosecution story by raising a probable defence. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory presumption. However, this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary.

27. In the present case, the petitioner has admitted in the notice under Section 251 Cr.P.C. that the cheques in question bear his signatures. Reference can be made to judgment of Apex Court in ***Rangappa v. Mohan: AIR 2010 SC 1898***, *"Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant."* Accordingly, the onus is upon the accused to rebut the presumption raised under Sections 118(a) and 139 of the said Act and the same can be done by accused by either bringing out loopholes in the case of the complainant or by bringing a reasonably probable defence in his favour. Since such case attracts a criminal liability, the burden of proof upon the complainant is to

the extent of proving his/her case beyond all reasonable doubts whereas the accused is required to create preponderance of probabilities in this favour.

28. At this stage, it is relevant to cite a leading judgment of the Hon'ble Supreme Court of India in the matter titled as ***Vijay vs. Laxman & Anr.:{(2013) 3 SCC 86}*** wherein it has been held that: *"We are not unmindful of the fact that there is a presumption that the issue of a cheque is for consideration. Sections 118 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption is, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case."*

29. Unlike the prosecution, accused is not required to establish his defence beyond all reasonable doubts. He is only required to create a hole in the story of prosecution to get the benefit of acquittal. Accused can say that the version brought forth by the complainant is inherently unbelievable and therefore the prosecution cannot stand. Or the accused can give his version

of the story and say that on the basis of his version the story of the complainant cannot be believed.

30. Since the petitioner has stated in his testimony before the Trial Court on 28.02.2019 that he cannot specify as to which particular cheque the amount of Rs. 2 lakhs relates to, for ease of reference, that particular cheque is taken to be cheque bearing no. 005604 issued in the sum of Rs.2 lakhs. However, with respect to the remaining cheques in question, the liability has been explicitly and unequivocally accepted by the petitioner in his testimony as DW2.

31. It is pertinent to mention here Section 58 of the Indian Evidence Act, 1872 which states as follows: *'No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.'*

32. Admittedly, there has been default, in making payment, on the part of petitioner since July 2011. Despite the decree passed by this Court and conviction by the Trial Court, till date respondent has not received the payment due. The legal fight of the respondent had started from the legal

notice dated 11.08.2011 and continued till date. Thus, the respondent was compelled to run from pillar to post. In such circumstances as in the present case, the petitioner deserves no leniency or sympathy.

33. In view of above facts and the law discussed, I am of the view that there is no illegality or perversity in the orders passed by the Trial Court and Appellate Court as well.

34. Finding no merit in the present petition, the same is dismissed with no orders as to costs.

35. Pending application also stands disposed of.

36. The order be uploaded on the website forthwith.

(SURESH KUMAR KAIT)
JUDGE

DECEMBER 04, 2020
ab