

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

+ Crl.L.P.461/2011

Decided on : 24th August, 2012

VIPUL KUMAR GUPTA Petitioner
Through: Mr. K.K. Sharma for Mr. Prag Chawla,
Adv.

versus

VIPIN GUPTA Respondent
Through: Mr. S.K. Saxena, Adv.

**CORAM:
HON'BLE MR. JUSTICE V.K. SHALI**

V.K. SHALI, J.

Crl.M.A.11464/2011

1. This is an application seeking condonation of 44 days delay in filing the leave to appeal.
2. For the reasons mentioned in the application, as sufficient cause has been shown, the delay of 44 days in filing the appeal is condoned.
3. The application stands disposed of.

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4. This is a leave to appeal filed by the appellant against the judgment dated 1.6.2011 passed by the learned ACMM-I, North-West, Rohini Courts, New Delhi, dismissing the complaint of the appellant under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act), acquitting the respondent/accused.
5. Briefly stated, the facts of the case are that the appellant had filed a complaint under Section 138 of the Act against the respondent/accused, alleging therein that he was known to the father of the respondent/accused, being the Secretary of Creative Video Films Welfare Society. It has been alleged that the appellant gave a personal friendly loan of ₹ 9,00,000/- to the respondent/accused, who was in need of the same, by borrowing a sum of ₹ 4,50,000/- from his father, a sum of ₹ 2,00,000/- from his sister, Nidhi Gupta and the remaining amount from his own funds. The respondent/accused is alleged to have issued a cheque bearing no.478455 dated 21.11.2009, drawn on Oriental Bank of Commerce, Tagore

Garden Branch, New Delhi on account of the said repayment of the loan. The said cheque, on presentation, was dishonoured by the Oriental Bank of Commerce, the Banker of the respondent/accused on account of 'insufficient funds'. The appellant is purported to have received a Memo dated 27.11.2009, intimating regarding the dishonour of the cheque, whereupon he issued a legal demand notice dated 1.12.2009, requiring the respondent/accused to pay the amount within a period of one month and since the said amount was not paid, the action for prosecuting the respondent/accused was initiated by filing a complaint under Section 138 of the Act. The appellant examined himself as a witness at the pre-summoning stage and proved the relevant documents, whereupon the respondent/accused was summoned.

6. A notice under Section 251 of the Cr.P.C. was given to the respondent/accused on 7.8.2010 and the post-summoning evidence was taken by the Court by way of an affidavit of the appellant as CW1. He examined himself as the sole witness

and proved the return memo dated 27.11.2009 as CW1/2, legal notice dated 1.12.2009 as CW1/3, postal receipt, UPC and the returned envelope as CW1/4 to 1/6 respectively. During the cross-examination, the appellant admitted that he is an Income-Tax payee and maintains books of accounts regularly about his income and expenditure, but he had not shown the loan given to the respondent/accused. He neither did mention, either in the complaint or in the evidence, the date, month or the year when he was approached by the respondent/accused for the grant of loan nor did he obtain any receipt from the respondent/accused of having taken the loan. The defence of the accused in his statement under Section 313 Cr.P.C. was that there were five blank cheques duly signed by him, which were handed over to the appellant, as he had promised to get the loan of the respondent sanctioned under the Prime Minister Rojgar Yojana. The respondent examined himself as DW1 and supported his own defence.

7. The learned Trial Court, after hearing the arguments, acquitted the respondent/accused by observing that although under Section 139 of the NI Act, there is a presumption regarding the cheque having been issued by the drawer in favour of the drawee, but that presumption is a rebuttable presumption. The appellant is required to prove independently that the cheque in question has been issued by the respondent/accused either in discharge of his liability or a legally recoverable debt. It is with regard to this legally recoverable debt or liability that the learned ACMM, after appreciating the evidence of the two witnesses, i.e., the appellant and the respondent/accused, came to the conclusion that the appellant has not been able to prove that the cheque was issued by the respondent/accused in discharge of his liability or any legally recoverable debt. The reason given by the learned ACMM for coming to such a conclusion was that the appellant in his cross-examination has neither given the date, month or the year when the loan was taken nor had he obtained any receipt from the respondent/accused. The

amount of loan has neither been reflected in the Income Tax Return (though he states that he is an Income Tax payee and files his Income Tax Returns regularly), nor has it been reflected in the Books of Accounts. On the contrary, the cheque in question is signed by the respondent with a different ink and the particulars regarding the date, name and the amount, which has been filled up in the cheque, is with a different ink. This has been considered by him to be the sufficient reason to draw an inference regarding the probability of the genuineness of the defence of the respondent/accused and acquit him.

8. I have heard the learned counsel for the appellant as well as the learned counsel for the respondent and have gone through the impugned order.
9. I find myself in agreement with the reasoning given by the learned ACMM that before a person is convicted for having committed an offence under Section 138 of the Act, it must be proved beyond a reasonable doubt that the cheque in question, which has been made as a basis for prosecuting the

respondent/accused, must have been issued by him in the discharge of his liability or a legally recoverable debt. In the facts and circumstances of this case, there is every reason to doubt the version given by the appellant that the cheque was issued in the discharge of a liability or a legally recoverable debt. The reasons for this are a number of factors which have been enumerated by the learned ACMM also. Some of them are that non-mentioning by the appellant in his Income Tax Return or the Books of Accounts, the factum of the loan having been given by him because by no measure, an amount of ₹ 9,00,000/- can be said to be a small amount which a person would not reflect in his Books of Accounts or the Income Tax Return, in case the same has been lent to a person. The appellant, neither in the complaint nor in his evidence, has mentioned the date, time or the year when the loan was sought or given. The appellant has presented a cheque, which obviously is written with two different inks, as the signature is appearing in one ink, while as the remaining portion, which has been filled-up in the cheque, is in a

different ink. All these factors prove the defence of the respondent to be plausible to the effect that he had issued these cheques by way of security to the appellant for getting a loan from Prime Minister Rojgar Yojana. The respondent/accused has only to create a doubt in the version of the appellant, while as the appellant has to prove the guilt of the accused beyond reasonable doubt, in which, in my opinion, he has failed miserably. There is no cogent reason which has been shown by the appellant which will persuade this Court to grant leave to appeal against the impugned order, as there is no infirmity in the impugned order.

10. Accordingly, the leave to appeal is refused and the appeal itself is dismissed.

V.K. SHALI, J.

August 24, 2012
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