

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

Date of Decision: 12th December, 2014

+ **CRL.A.1394/2012**

HIREIN SHARMA Appellant

Through: Ms. Meena Chaudhary Sharma and
Mr. B.S. Tomar, Advocates along
with the appellant in person

versus

JYOTI RAJPUT & ORS. Respondents

Through: Mr. Narender Sharma and Mr.
Sidharth Pandit, Advocates for R-1&2
Ms. Jasbir Kaur, APP for R-3/State

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Unsuccessful complainant in case relating to offence punishable u/s 138 of Negotiable Instruments Act, 1881 (in short NI Act) is the appellant herein. He filed CC No. 482/2010 before Chief Metropolitan Magistrate against the accused alleging offence under Section 138 of the NI Act on the ground that he and his mother had inducted the accused/respondent No.1, director of Respondent 2 company as a tenant in about 1000 ft. area on the third floor of

premises in Vikas Tower, Plot No.6, Sector-8, Rohini w.e.f. 1st October 2005 by a registered rent agreement. As per the rent agreement, the total rent of the premises was Rs.32,000/- per month which included a sum of Rs.10,000/- p.m. towards the furniture and fixture let out by the complainant. Additionally, Respondent had given Rs.1,50,000/- as security deposit to the appellant which was refundable after the vacation of the tenanted premises. A second agreement was made in 2005-2006 between the parties wherein an additional area of 2000 sq.ft. was given to the respondent for tenancy purposes and the rent was increased to Rs.60,000/- p.m., payable after deduction of tax at source. The rent for the usage of furniture and fixtures of Rs.10,000/- was exclusive of the rent amount. However, in the month of April 2007, due to unnecessary closeness of respondent no.1 with the cousin of the appellant namely Amit Gupta, the mother of the appellant asked respondent no.1 either to refrain from the uncalled proximity with Amit Gupta or vacate the premises. Respondent no.1 declared to vacate the said premises on 1.07.2007. However, when the complainant went to collect the keys of the premises, respondent sought one more month's time to vacate the premises. Since the appellant and his mother had already decided

to induct a new tenant at the said premises at an enhanced rate from 1st July 2007, respondent No.1 gave a cheque of Rs.42,500/- to compensate the damages of the loss of rent/difference in the lease rent. The said cheque No. 000215 amounting to Rs.42,500/- drawn on Bank of India, Sector 8 of Rohini was deposited by the complainant in his bank for encashment on 8.08.2007 which was returned dishonoured by the bank of the respondent on account of 'stop payment'. The appellant got intimation of the dishonour of the cheque on 11.08.2007 and served a legal notice dated 6.09.2007 on the respondent asking her to make the payment in respect of the dishonoured cheque. The respondent sent a reply to the legal notice on 15.09.2007 and did not make the said payment within the stipulated period. Hence, appellant filed a complaint before the competent court under Section 138 of NI Act.

2. During trial in the Lower Court, the complainant examined himself. The respondent also examined herself. The Lower Court after considering contention of both the parties found the accused not guilty of the offence u/s 138 of the Act and acquitted the accused by stating that the accused was successful in raising a probable defence as she showed the non-existence of any debt or liability and

consideration. As per the trial court, the complainant has only claimed that at the time of termination of tenancy, there were dues in respect of electricity bills, however, the complainant failed to substantiate his claim by any cogent evidence and that the complainant himself had submitted that the accused was paying the electricity bills on actual bills and hence the said cheque in question cannot be said to be issued with regard to the discharge of dues with regard to the electricity bills. It was further noted that the complainant's claim that there were some dues in respect of damages of missing furniture and damaged fixture cannot be justified as a definite amount in liquidated form cannot be arrived at since no details with regard to the damages have been furnished by the complainant. Even the complainant had not taken any stand that he made any estimation of the damage done by the accused. It was further observed by the trial court that since no final settlement was arrived at between the parties, the complainant and his mother have to account for the security deposit of Rs.1,50,000/-. Although nothing has been stated by the complainant in this respect, it may be deduced that the said security deposit had been adjusted towards the so called electricity dues and damages and if it hadn't been adjusted,

then the electricity dues of Rs.42,500/- ought to have been adjusted with the security amount of Rs.1,50,000/-. Furthermore, it was held that the termination of the rent agreement was at the behest of the landlord and as per the rent agreement, accused was clearly having a three months notice period. However, she decided to leave the premises at the earliest without waiting for such notice period. There was no right vested in the complainant to claim any excess payment and there was no liability on the accused to pay any excess amount. Hence, the trial court held that the accused was able to give a probable defence. The complainant has not examined anybody else except himself and, therefore, accused was acquitted from the charges in the present case.

3. Aggrieved, the present appeal has been preferred by the complainant/appellant under Section 378, Sub-Section 4 r/w Section 482 of the Code of Criminal Procedure, 1973.

4. Since this is an appeal against acquittal, it will be proper to consider the legal position first. Chapter XXIX (Sections 372-394) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the present Code') deals with appeals. Section 372 expressly declares that no appeal shall lie from any judgment or order of a

Criminal Court except as provided by the Code or by any other law for the time being in force. Section 373 provides for filing of appeals in certain cases. Section 374 allows appeals from convictions. Section 375 bars appeals in cases where the accused pleads guilty. Likewise, no appeal is maintainable in petty cases (Section 376). Section 377 permits appeals by the State for enhancement of sentence. Section 378 confers power on the State to present an appeal to the High Court from an order of acquittal.

5. The said section is material and may be quoted in extenso:-

"378. Appeal in case of acquittal.- (1) Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court, or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of Sub-section (3), to the high Court from the order of acquittal.

(3) No appeal under Sub-section (1) or Sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under Sub-section (1) or under Sub-section (2)."

6. Whereas Sections 379-380 cover special cases of appeals, other sections lay down procedure to be followed by appellate courts.

7. Bare reading of Section 378 of the present Code (Appeal in case of acquittal) quoted above, makes it clear that no restrictions have been imposed by the Legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High Court has full power to reappreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal.

8. After referring to various decisions pronounced by Supreme Court in ***Chandrappa and Ors. vs. State of Karnataka***, 2007 CrI L.J

2136, following general principles were laid down regarding powers of appellate Court while dealing with an appeal against an order of acquittal:-

- (i) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;*
- (ii) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;*
- (iii) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.*
- (iv) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*
- (v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."*

9. Applying the above said principles, it will now be appropriate to advert to the factual matrix of the case.

10. Learned counsel for the appellant Ms Meena Chaudhary Sharma has challenged the findings of the Trial Court on the ground

that the accused/respondent had issued 3 cheques dated 10.07.2007 bearing Nos. 214, 215 and 217 for an amount of Rs.51,000/-; Rs.42,500/- and Rs.10,000/-. While Cheque no. 214 was issued in the name of the complainant's mother, cheque no.215 and 217 were issued in the name of the complainant. While cheque no.214 and 217 were honoured by the respondent, Cheque No.215 being the cheque in question of an amount of Rs.42,500/- was intentionally stopped for payment although there was insufficiency of funds in the account of the respondent. It was further submitted that in her reply to the legal notice, she denied having issued any cheque and alleged that the cheque had been misplaced from her office and hence she asked the bank to stop the payment. However, in her statement recorded in the present case, she stated that the complainant had not returned her security amount and this was the reason she had not paid the cheque amount. On the first date of hearing, she appeared and brought a cheque of Rs.10,000/- and also wished to pay the balance amount which shows her liability towards the stated amount. Civil Suit filed by her was dismissed in default. The criminal complaint filed by her stands dismissed. The accused has failed to rebut the presumption

u/s 139 of the NI Act. Impugned judgment being perverse is liable to be set aside. Reliance was place on number of authorities.

11. Per contra, learned counsel for the respondent submitted that when the respondents were asked to vacate the tenancy premises, the appellant agreed to refund the security amount of Rs.1,50,000/-. Respondent agreed to pay a sum of Rs.42,500/- to the appellant on the above term of refunding of the security amount. On 10.07.2007, the appellant visited the office of respondent. Respondent no.1 had prepared the cheque in question in the name of the appellant, however, since the appellant had not brought the cheque of Rs.1,50,000/- as agreed by him, respondent did not hand over the cheque in question. Thereafter, the respondent found the above cheque missing and could not trace the cheque despite efforts and therefore submitted an application to the Bank for stoppage of payments. Respondent later on learnt that the cheque in question was stealthily taken by the appellant who presented the same for encashment. It was further submitted by respondent no,1 that in order to avoid any unnecessary litigation, respondent no.1 on the first very first date of hearing before the trial court on 4.06.2008, offered to pay the cheque amount and that she had also brought a demand

draft of Rs.10,000/- towards part payment of the said amount. It is well settled that in case the accused appears before the court on the first date of hearing and offers payment against the dishonoured cheque, then the criminal complaint should not be proceeded with. Moreover, the respondent had duly rebutted the presumption laid down u/s 139 NI Act since the respondent proved that the cheque in question was stopped by her despite having sufficient money in her account. Also, no case is made out in favour of the appellant as he was already having a security deposit of Rs.1,50,000/- with him. The impugned judgment was passed by the learned Trial Court after due appreciation of the evidence and, therefore, the same does not call for any interference. The appeal is liable to be dismissed.

12. In order to appreciate the respective submissions of the counsel for the parties, it will be desirable to reproduce the relevant provisions:-

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, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;*

138. Dishonour of cheque for insufficiency, etc., of funds in the account. - *Where any cheque drawn by a person on an account*

maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-

- i the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.*
- ii. the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
- iii. the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

Explanation. - For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability.

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.*

13. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act.

14. In *Hiten P. Dalal v. Bratindranath Banerjee*, AIR 2001 SC 3897, the Supreme Court observed that Sections 138 and 139 of the Act introduced exceptions to the general rule as to the burden of proof in criminal cases and shifted the onus on the accused in the following manner:

"Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v. A. Vaidyanatha Iyer, AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. 'it introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused' (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court 'may presume' a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

In K.N. Beena v. Muniyappan, 2001(2) ALD (CrL.) 824 the Supreme Court observed that it would be erroneous approach in case the burden is cast on the prosecution/complainant to prove that the cheque was issued for a debt or liability. The Supreme Court further observed that the accused had to prove in the trial by leading cogent evidence that there was no debt or liability and that the accused not having led any evidence could not be said to have discharged the burden cast on him.

In Rangappa v. Mohan, AIR 2010 SC 1898 also the Supreme Court held that existence of legally recoverable debt or liability is a matter of presumption under Section 139 of the Act.

15. Present case is to be scrutinized in the light of the above decisions rendered by the Supreme Court. Relationship of the landlord and tenant between the parties is not in dispute. There is also no dispute that a cheque bearing No. 215 for a sum of Rs.42,500/- was prepared by the respondent/accused. When presented, the cheque was dishonoured by the bank with the remarks 'stop payment'. Section 138 of the Act is attracted even when a cheque is dishonoured on account of 'stop payment' instruction sent by the accused to his bank in respect of post dated cheque irrespective of insufficiency of funds in the account. This position was clarified in **Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza**, (2003) 3 SCC 232 wherein it was held:-

"Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque. In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138. A contrary view would

render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong....”

16. It is also not in dispute that after dishonour of cheque, complainant sent a legal notice Ex.CW1/3 which was duly received by the accused and reply Ex.CW1/6 was sent by the accused. In reply to the legal notice, it was alleged that no such cheque was ever issued as compensation or damage for loss of rent. The cheque had been misplaced and the report had been sent to the banker and the payment of the said cheque had been stopped by the accused due to abundant caution.

17. On failure of the accused to comply with the legal notice, the complaint in question was filed by the complainant under Section 138 of the Act. After summons were issued to the respondent, the accused appeared on 4th June, 2008 and at that time she brought a demand draft of Rs.10,000/- and also volunteered to pay the balance cheque amount within 15 days. However, the complainant refused to receive the same as more than Rs.2 lacs were due from the accused. Thereafter notice under Section 251 Cr.P.C. was served upon the accused. The accused, however, did not disclose her defence at that

stage which she was required to disclose as observed in **Rajesh Aggarwal & Ors. v. Y.K. Goel**, 2010 VII AD (Delhi) 57 that since offence under Section 138 of NI Act is a document based technical offence, deemed to have been committed because of dishonour of cheque issued by the accused or his company, the accused must disclose to the Court as to what is his defence on the very first hearing when the accused appears before the Court. Thereafter, statement of the accused was recorded under Section 263(g) Cr.P.C. and at that time, the accused stated as under:-

"I know the complainant. Cheque is drawn by my bank A/c and bears my signatures. Cheque return memos are not disputed. I have received legal notice from the complainant and replied to the same. I have not received any legal notice in respect of termination of tenancy. Therefore, there is no question of any damages. Rs.1.5 lacs was given to the complainant and his mother as a security for two years. However, complainant has not returned the said security amount. This is the reason for which I have not repaid the cheque amount after due receipt of legal demand notice from the complainant and its payment was stopped."

18. During the trial, the accused was permitted by the learned Trial Court to file affidavit by way of evidence which according to the appellant was in contravention of Section 145(2) of NI Act and in violation of judgment of Hon'ble Supreme Court rendered in **M/s. Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore** reported in JT 2010 (1) SC 259 as there is no provision in law to permit the accused to file

affidavit in evidence. Along with the affidavit, the accused also filed copies of certain documents which were:-

- (i) Rent Agreement dated 29th March, 2007;
- (ii) Photocopy of a letter dated 11th July, 2007 to SHO Rohini regarding misplacement of the cheque;
- (iii) Copy of letter to bank regarding 'stop payment' of cheque dated 11th July, 2007;
- (iv) Copy of statement of account of accused from Bank of India showing the status of three cheques numbering 214, 215 and 217;
- (v) Copy of Civil Suit for recovery of Rs.1,91,250/- filed by the accused against mother of the complainant;
- (vi) Copy of the complaint filed by the accused dated 5th July, 2008, SHO Ashok Vihar, Rohini &
- (vii) Copy of complaint filed by the respondent before ACMM, Rohini dated 4.2.2009

19. In that affidavit, the accused took the plea that at the time of termination of tenancy, the complainant informed the accused that he will return the security of Rs.1,50,000/- to the accused by way of cheque as this will help both the parties for tax purpose and the complainant came to the office of accused on 10th July, 2007. The

accused prepared a cheque for a sum of Rs.42,500/- in the name of the complainant towards full and final settlement of all the claims regarding the electricity charges etc. When the accused asked the complainant to deliver the cheque towards refund of security of Rs.1,50,000/- then the complainant told that he had forgotten to bring the same. The accused was attending to some other telephone calls and other office work and taking advantage of her pre-occupation in other office work, the complainant removed the cheque from table of the accused and carried it away with him without the knowledge and consent of the accused. The accused searched the office file thinking that cheque might have been misplaced or wrongly tagged in some other files which were lying on the table but when the cheque was not traced, instructions were issued on 12th July, 2007 to the Bank to stop the payment in respect of the said cheque. Later on, the accused came to know that the complainant had apparently stolen/removed the cheque from the office of the accused without her knowledge and presented the same for encashment with the banker of the accused. In these circumstances, the accused filed a civil suit for recovery of amount of Rs.1,50,000/-, also filed complaint with SHO, Police Station Rohini and Ashok Vihar and also filed a criminal complaint

against the complainant. It is a matter of record that the civil suit filed by the accused was dismissed in default. Thereafter, application under Order 9 Rule 9 CPC was moved for restoration of the suit which was dismissed vide order dated 31st May, 2010. Moreover, although it was alleged that a complaint was made to SHO, Rohini on 11th July, 2007 itself, however, in the criminal case filed by the accused, status report was filed by the SHO stating therein that no such complaint dated 11th July, 2007 was received. The complaint to SHO, Ashok Vihar was made at a very belated stage on 5th July, 2008. Moreover, the criminal complaint filed by the accused against the complainant for theft of cheque in question has also been dismissed by the learned Metropolitan Magistrate vide order dated 8th September, 2014.

20. The result of the aforesaid discussion is that the accused is taking different stands at different stage of the proceedings, inasmuch as, in her statement recorded by the Metropolitan Magistrate, she took the plea that since the complainant had not returned the security amount, therefore, she did not repay the cheque amount even after the receipt of legal demand notice. At other places, it was pleaded that the cheque was misplaced and, therefore, she gave instructions for

‘stop payment’ and subsequently it was pleaded that the cheque was stolen by the complainant. The plea of commission of theft of the cheque by the complainant was disbelieved by the learned Metropolitan Magistrate when the complaint filed by the accused on this account was dismissed. Even the Civil Suit filed by her was dismissed in default and the application for restoration also met the same fate.

21. Under the circumstances, the accused failed to rebut the presumption under Section 139 of the NI Act. The findings of the learned Trial Court that except for examining himself, the complainant has not examined any other witness and, therefore, the complainant failed to discharge the re-shifted burden which lay upon him, cannot be sustained keeping in view the fact that the complainant has examined himself while leading pre-summoning evidence after giving his affidavit wherein he had specified that the cheque was given in discharge of a pre-existing liability. The accused did not choose to cross-examine the complainant with the result his testimony went un rebutted. It is settled legal proposition that that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain

his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, *inter-alia*, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. {See: **Khem Chand v. State of Himachal Pradesh**, AIR 1994 SC 226; *State of U.P. v. Nahar Singh (dead) and Ors.*, AIR

1998 SC 1328; *Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.)*, AIR 2001 SC 3207; and *Sunil Kumar and Anr. v. State of Rajasthan*, AIR 2005 SC 1096 and *Laxmibai (Dead) thr. L.Rs. and Anr. vs. Bhagwantbuva (Dead) thr. L.Rs. and Ors.*, (2013)4SCC97}.

Subsequently, an application under Section 145(2) of NI Act was moved which was dismissed by the learned Trial Court vide order dated 28th January, 2011 and the revision preferred against that order was also dismissed by learned Additional Sessions Judge vide order dated 23rd July, 2011. That being so, although on the one hand, the learned Trial Court observed that the evidence of the complainant remained unrebutted but at the same time went on noting that the complainant never led any other evidence which he could have done. Once the evidence of the complainant remained unrebutted there was no need for the complainant to lead any further evidence, more particularly, when the accused failed to rebut the presumption under Section 139 of the Act. Therefore, this Court finds that cheque in question is supported by legally enforceable debt owed by the accused to the complainant.

22. On a reading of the judgment of the Lower Court, it is apparent that the Lower Court went into other disputes between the parties

pertaining to security deposit, electricity charges and other collateral issues and that even if there was any liability, the same could have been adjusted from the security deposit of Rs.1.5 lac. In arriving at this conclusion, the learned Trial Court fell in error as this was a complaint pertaining to dishonour of cheque and, therefore, subject of refund of security was totally alien to these proceedings. Moreover, this aspect could have been considered by the learned Civil Judge where civil suit was filed which also was dismissed. Even otherwise the civil suit was not even filed against the complainant but was against his mother.

23. Thus, on reading and evaluation of entire evidence on record, this Court finds that the judgment of acquittal passed by the learned Trial Court is erroneous and perverse and is not sustainable both on facts and in law.

24. In the result, the criminal appeal is allowed setting aside the acquittal recorded by the Lower Court and finds the accused/first respondent guilty of offence under Section 138 of the Act. Accordingly, the accused/first respondent is convicted for the offence under Section 138 of the Act and is directed to pay a sum of Rs.85,000/- to the complainant/appellant within four weeks failing

which the learned Trial Court is directed to get the same realized in accordance with law.

The appeal stands disposed of.

Trial Court record be sent back along with the copy of the judgment.

(SUNITA GUPTA)
JUDGE

DECEMBER 12, 2014
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