

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

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Judgment delivered on: 02nd April, 2018

+ CRL.REV.P. 102/2016

AVDESH GUPTA

..... Petitioner

versus

SATISH SHARMA & ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Upendra Tiwari, Advocate.

For the Respondents : Ms. Indra Bhushan Goel, Adv. for R-1.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. The petitioner (complainant in the original complaint under Section 138 of the Negotiable Instruments Act) impugns order dated 26.09.2015 passed by the appellate court, whereby the appellate court has set aside the order of conviction dated 24.07.2015 and order on sentence dated 31.07.2015 and acquitted respondent no. 1.

2. The petitioner had filed a complaint under Section 138 of the Negotiable Instruments Act against the respondent no. 1 contending that petitioner had advanced a friendly loan of Rs. 1 lakh on 16.03.2011 and another loan of Rs. 1 lakh in April, 2011. The respondent in discharge of the said liability is alleged to have issued

two post dated cheques in the sum of Rs. 1 lakh each; both dated 01.09.2011. When the said cheques were presented for encashment they were returned unpaid for the reasons of “Insufficiency of Funds”.

3. The petitioner issued a notice of demand dated 12.09.2011. Despite delivery of the same, the respondent failed to send any reply to the said notice of demand. Consequently, the subject complaint under Section 138 of the Negotiable Instruments Act was filed.

4. By judgment dated 24.07.2015, the trial court convicted the respondent no. 1 of the offence under Section 138 of the Negotiable Instruments Act. By order on sentence, respondent no. 1 was sentenced to simple imprisonment for a period of three months and directed to pay compensation of Rs. 3.50 lakhs within two months, failing which to further undergo simple imprisonment of two months.

5. By the impugned judgment dated 26.09.2015, the appellate court set aside the order on conviction and sentence and acquitted Respondent no. 1.

6. It is contended by learned counsel for the petitioner that the appellate court erred in setting aside the order on conviction. It is contended that the appellate court erred in holding that respondent had repaid the loan or that there was a running account between the parties. It is contended that the appellate court erred in holding that the respondent no. 1 had sufficiently rebutted the presumption that

subject cheques had been issued in discharge of the liability. It is further contended that the appellate court erred in holding that presumption had been rebutted on the assumption that the cheque book had been issued prior to 01.01.2010 and the subject cheques were issued after about 1- ¾ years-in the year 2011 and thereby a suspicion arose that the cheques were lying in the custody of the petitioner for quite a sometime and had been misused.

7. Per contra, learned counsel for respondent no. 1 contended that the trial court had erred in not appreciating that Respondent no. 1 had duly rebutted the presumption and proved before the trial court that the said amount was not a loan advanced by the petitioner but the petitioner was running a “Committee” and had failed to disclose this fact before the trial court. Further it is contended that the respondent no. 1 had repaid the loan amount and made a total payment of Rs. 2.70 lakhs and only an amount of Rs. 7000/- was due and payable and the subject cheques were issued blank and given as a security. There was no legally recoverable debt when the cheques were presented for encashment. The Petitioner had admitted two entries of deposit of Rs. 10,000/- in the account of the petitioner and also deposit by brother of Respondent No. 1 into his account and also deposits into the bank account of the wife and daughter of the petitioner.

8. It may be noticed that the trial court in the order of conviction noticed that the respondent no. 1 had admitted that the cheques in

issue were from his account. He had even accepted the signatures on the cheques. The defence raised was that the Respondent No. 1 had repaid the amount taken as loan. Noticing the fact that the cheques were admittedly signed by respondent no. 1, the trial court raised the presumption in favour of the petitioner. The trial court relying on several decisions of this Court held that the mere fact that blank cheque issued was immaterial.

9. The trial court noticing the defence of the Respondent no. 1 that he had re-paid a sum of Rs. 2.70 lakhs to the petitioner held as under:-

“4. Since, as discussed above, the presumption is in favour of complainant the burden is upon accused to prove his defence though on the scale of preponderance of probabilities. Accused as per his defence has to prove the factum of payment of Rs.2,70,000/- to the complainant. As per his examination-in-chief, accused has deposited Rs.1.5 lakhs in the bank account of complainant, Rs.50000/- in joint account of complainant's wife and daughter. Further, accused has stated that he has given Rs.70,000/- in cash to the complainant through his brothers.

5. However, accused has not placed any document on record to show how and when the sum of Rs. 1,50,000/- was deposited by him in the bank account of the complainant except for two receipt for Rs.20,000/- (in total Ex.CW1/D1 and Ex.CW1/D2). However, complainant when confronted with these receipts stated that these receipts were towards separate loan of Rs.20,000/- which was given to the accused. Apart from this, accused has produced no proof of payment towards the complainant. Moreover, accused was confronted

with statement of account of daughter and wife of complainant (Ex.CW1/2) and he stated that it is not clear which payments were made by him.

6. Accused did not produce any document nor did he summon any bank witness to prove that money was deposited by him to the bank account of complainant and that of complainant's wife and daughter. The admission by accused in his cross-examination that he used to deposit money for membership of committee casts further doubts on his version. He has also not revealed any details of the cheque by which he claim to have paid Rs.15,000/- to the complainant in his application u/s 145 (2) of Negotiable Instruments Act 1881. Accused did not even examine his brothers who, as per him, made the payment of Rs.70,000/- to the complainant.

7. Further, accused has stated that two loan agreements were executed between him and complainant. But none of them has been placed on record. Accused has stated that he had taken loan in the year 2009-10 but he does not remember the date on which loan was taken. He does not remember the date on which he has made payment to complainant by way of cash. In his examination in chief accused has stated that Rs.70,000/- in cash was paid to the complainant through his brothers. But he has not summoned his brothers to prove this fact. However, in this cross examination he has stated he had paid the complainant thrice by way of cash. Further accused does not remember the amount paid by him in cash. This improbabilises the defence plea raised by accused.

8. Also, the accused has failed to prove that cheques in question were given by him in 2009-10. Factum of repayment of loan also has not been proved. Further there is no explanation as to why accused failed to take

any action after complainant did not return his cheque especially when complainant had a quarrel with him. He did not even issue stop payment instructions to his banker.

9. *In his application u/s 145 (2) of NI Act accused has stated that he has made the payment of Rs. 1,00,000/- in cash to the complainant. In his examination-in-chief he has stated that Rs. 70,000/- was given in cash through his brothers. But, in his cross-examination accused has stated that he had made cash payment to complainant thrice but he does not know the exact amount paid by him. Hence there is inconsistency in the stand of accused with respect to amount which as per him has been repaid to complainant in cash. Further accused has stated in his statement u/s 313 Cr.P.C that he has made the payment of Rs.2,70,000/- to the complainant. However as per his examination-in-chief he has made the payment in the sum of Rs.2,85,000/- (1,50,000 + 50,000 + 15,000 + 70,000/-) and more than Rs.2,75,000/- as per his application u/s 145 (2) of Negotiable Instruments Act 1881. This continuously fluctuating stand taken by accused with respect to amount repaid by him punctures holes in his defence.*

10. *In wake of abovementioned discussion, all the ingredients of offence u/s 138 Negotiable Instruments stands proved against the accused.*

Accordingly, accused Satish Sharma is convicted of offence u/s 138 NI Act. Let accused be heard on point of sentence.”

10. The appellate court while setting aside the order of conviction of the trial court held as under:-

“7.1 I shall now discuss the evidence relied upon by the appellant/accused to rebut the presumption. During the cross examination of complainant (CW-1), he deposed that there was no agreement executed at the time of giving of loan. He was confronted with two receipts Ex. CW1/D-1 and Ex. CW1/D-2 dated 12.7.2011 and 25.8.2011 for the amount of Rs. 10,000/- each, deposited by the accused in his account. He volunteered that the payment was towards another loan of Rs. 20,000/-, which was advanced in May 2011. He also admitted receiving Rs. 50,000/- from the accused through one of his relative in December 2010. He volunteered that this payment was towards transaction for some 'Committee'. He also admitted credit of some amount by the accused in bank account of his wife and daughter on 5.5.2010. However, he denied that those credits were towards repayment of the present loan.

7.2 Appellant subsequently stepped into witness box himself as DW-1 and deposed that he had repaid the loan amount by way of payment totaling Rs. 2.70 lacs. Only an amount of Rs. 7000/- remained to be paid, for which he demanded the cheques to be returned. But complainant claimed the cheques to have been lost and further demanded Rs. 35,000/- to Rs. 40,000/- as balance payment. During his cross examination he was confronted with the bank statements of account of daughter and wife of complainant and was suggested that payment at points A to Q of bank statement Ex. DW1/C-1 (during the period 1.1.2009 to 31.12.2011) were repayment for deposit in 'Committee'. The study of the statement EX. DW1/C-1 reveals that last payment credited is dated 26.8.2011.

7.3 From the evidence as noticed above, it can be safely gathered that there had been a running account between the parties. It is not an incident of two single transactions of Rs. One lac each as initially claimed by

the complainant/respondent. Complainant was running a 'Committee' and also claims to have advanced another loan, after the loan in question. Suggestions given to DW-1 that payments reflected in Account Statement Ex. DW-1/C-1 were towards a 'Committee', amounts to admission by complainant that he was running a 'Committee' of which accused was a member. A study of his complaint and his affidavit Ex. CW1/A reveals that he is totally silent about any other loan transactions and the 'Committee'. The explanations that has been rendered in his cross examination, about other loan transactions and running of committee are a matter of fact, which ought to have been proved by him by way of rebuttal evidence. His admission of having received Rs. 20,000/- by way of receipts Ex. CW1/D-1 and Ex. CW1/D-2, credits in Bank account of his wife and another amount of Rs. 50,000/- is sufficient to rebut the presumption, that the cheques in question were issued towards discharge of liability of Rs. One lac each. His silence about other transactions and the Committee indicates that he has not stated the entire truth in his complaint. The onus on accused to discharge the presumption was only by way of preponderance of evidence, which he has sufficiently discharged by proving that there were transactions between them, over and above what the complainant initially pleaded. Receipt of amounts having not been explained at the first instance, a reasonable defence is created that accused had repaid the loan in part or full. Presumption having thus been rebutted, complainant cannot be absolved of his responsibility to prove the case beyond reasonable doubt. The onus having shifted back to him. I am, therefore, of the opinion that Ld. Trial Court has committed an error in holding that accused failed to rebut the presumption.

8. *The defence of the appellant that the cheques in question were issued as a security in the year 2009 is*

supported by a study of the cheques (Ex. CWI/1 and Ex. CWI/2). Printed date on the body of the cheques (Ex. CWI/1 and Ex. CWI/2) is Date ____/____/200____. Apparently the cheque book in question was printed and issued prior to 1.1.2010; otherwise printed date would have been Date ____/____/201____. Use of cheques issued prior to January 2010 i.e. almost 1/3rd year later, does raise a suspicion that the cheques were lying in the custody of complainant, since quite some time and might have been misused by him.

9. For the reasons stated above, I am of the opinion that the impugned judgment suffers from illegality, in as much as the ld. Trial court failed to appreciate rebuttal of presumption by appellant/accused. The judgment of conviction dated 24.07.2015 and order on sentence dated 31.07.2015 are, accordingly, set-aside.

Appellant is acquitted. Surety is discharged. Bail bond is canceled.”

11. The Impugned order shows that the Appellate court was of the opinion that there had been a running account between the parties and it was not an incident of two single transactions of Rs. One lac each. The Petitioner was running a 'Committee' and claims to have advanced another loan, after the loan in question and the petitioner was silent about any other loan transactions and the 'Committee'. The fact that the Petitioner admitted to having received Rs. 20,000/-, in the view of the appellate court, was sufficient to rebut the presumption, that the subject cheques were issued towards discharge of liability of Rs. One lac each. The appellate court was of the view that Respondent No. 1 had sufficiently discharged the onus. Further

the Appellate court was of the view that as the cheque book was printed and issued prior to 01.01.2010, the use of the said cheque book in the year 2011 raised a suspicion that the cheques were lying in the custody of complainant, since quite some time and might have been misused by him.

12. The appellate court has clearly fallen in error in reversing the well reasoned order on conviction of the Trial Court. The appellate court failed to notice that Respondent No. 1 had admitted taking of the loan. He had admitted that the subject cheques had been signed by him, though blank. The defence raised was that he had repaid the amount taken as loan. Since the defence was that the amount had been repaid, the onus was on Respondent No. 1 to prove by cogent evidence that he had re-paid the loan amount sum to the petitioner and there was no legally recoverable debt when the subject cheques were presented for encashment.

13. In his statement recorded under Section 313 Cr. P.C., respondent no. 1 stated as under:-

Q.1 It is evidence against you that you have obtained a friendly loan of Rs. 2,00,000/- each from the complainant and in respect of that friendly loan from the complainant, you issued two cheques bearing no. 926431 and 926470 both dated 01.09.2011 for a sum of Rs. 1,00,000/- each which is Ex. CW1/1 and Ex.CW1/2. These cheques were dishonoured on presentation to your banker for the reasons "Funds Insufficient" vide cheque return memo dated 01.09.2011 which is Ex. CW1/3 and Ex.CW1/4. On this a legal demand notice

dated 12.09.2011 which is Ex. CW1/5 was sent to you through registered AD. Despite the service of legal demand notice, you failed to make payment within stipulated period of 15 days from receipt of the said notice. What do you have to say?

Ans.1 It is incorrect. I duly replied the legal demand notice. I have already made the payment of Rs.2,70,000/- till 25.07.2011. I owed only Rs.7,000/- to the complainant. I had issued the aforesaid blank cheques as security to the complainant which the complainant misused. It is a false and fabricated case in which I have been wrongly implicated. I only owe Rs.7,000/- to the complainant.

14. For the sake of completeness, it would be expedient to extract the evidence led by Respondent No.1. He examined only himself as DW1. In his examination in chief recorded on 11.12.2013, he deposed as under:-

"I have taken a loan of Rs. 2 lacs from the complainant in the year 2009-2010 and two loan agreements were executed. I have already made the payment of Rs.2,70,000/- including interest amount to the complainant partly in cash and partly deposited in the account of the complainant, his wife and his daughter. I only owe Rs.7000/- towards the complainant. Complainant had come to collect Rs.7000/- at my shop. I asked him to return my blank signed cheques in question first then I will give Rs.7000/- to him. However, complainant refused to return the cheques in question saying that he has lost the cheques in question and started saying that Rs.35,000/- to Rs.40,000/- are due from you. A fight also took place between me and the complainant regarding this issue. Complainant had also filed a Non Cognizable Report at PS Kashmere

regarding the misplacement of cheques. I had asked the complainant to provide me the cheque numbers to which he stated that everything is written in the loan agreements and I will provide you the details after noting down the same. After 3-4 days complainant told me that he has found the cheques in question in his pocket and he also got the Non Cognizable Report at PS Kashmere Gate cancelled. I had deposited Rs.1,50,000/- in the bank account of the complainant, Rs.50,000/- in the joint account of his daughter and wife and Rs.15,000/- by way of cheque. I had also given Rs.70,000/- in cash to the complainant through my brother Mr. Pummy and Mr. Shalesh Sharma.

(underlining supplied)

15. In the cross-examination, respondent no. 1 stated as under:-

“It is correct that I know the complainant since 2005. it is also correct that I was having friendly relations with the complainant. It is correct that I used to take loan earlier from the complainant. It is correct that I have not filed agreement between me and the complainant executed in 2009-2010 before this court. I do not remember the exact date when I had deposited Rs.2,70,000/- in the account of the complainant and his wife and daughter. It is correct that I have not filed the counter foils of the payment made in the account of the wife and daughter of the complainant except the last two counter foils. It is wrong to suggest that document Ex. CW1/D1 and Ex. CW1/D2 are not concerned with the present transaction. It is correct that the cheque Ex. CW1/2 and Ex. CW1/1 belongs to my account and bear my signatures. The contents of the cheques were not filled up by me. It is wrong to suggest that I have filled up the contents of the cheque. It is wrong to suggest that I have not taken loan from the complainant for Rs.1 Lac on 16.03.2011. It is wrong to suggest that I had again taken a loan of Rs.1 Lac in the month of April 2011. It is wrong

to suggest that I have issued two cheques against the said loan. It is correct that the said cheque was dishonoured on 01.09.2011. It is correct that I was not having sufficient funds in my account at the time of presentation of cheque. I had asked my counsel to reply to the legal demand notice as I was out of station at the time of service of legal demand notice at my residence, but when I came back I found he had not replied the same.

I do not remember the exact date when I had taken the loan from the complainant. However, it was around 2009-10. It is incorrect to suggest that I had taken loan in year 2011. I do not remember the exact date when I have made the payment to the complainant in cash or by way of deposit back account of the complainant or into the joint account of his wife and daughter. I do not remember the account number however I have placed the same on record. I have made the payment to the complainant thrice by way of cash. I do not remember the amount paid by me in cash to the complainant. I do not remember the number of times the amount was deposited by me by way of deposit in the bank account of the complainant or into the joint account of his wife and daughter. I have placed on record only one receipt of deposit into the account of the complainant. I only remember that I had invited the complainant to my shop for payment in the year 2011. the complainant had shown me the copy of NCR of the cheque. It is wrong to suggest that complainant has not shown any NCR to me. It is wrong to suggest that no quarrel took place between me and complainant at my shop. It is correct that I have not lodged any police complaint with respect to cheque in question when complainant refused to return the cheque. I did not serve any legal notice upon the complainant for return of my cheque. I have not filed any suit to stop the cheque from being presented. At the stage accused is shown the statement of account of the complainant as

well as that of joint account of wife and daughter. The same is Ex.DW1/C1 (01.01.2009 to 31.12.2011) and EX.DW1/C2 (01.01.2010 to 06.12.2012) collectively. This document bears deposit of money by me into the abovementioned accounts at point A to Q in Ex.DW1/C1. However, It is not clear in EXDW1/C2 as to which payments have been made by me. It is correct that I used to deposit money for membership of committee. It is incorrect to suggest that the payment which has been marked as points A to Q in EX.DW1/C1 is my repayment for deposit into the committee. It is incorrect to suggest that the cheque in question has no connection with the payments made by me and mentioned in EXDW1/C1. It is correct that I have not written any letter to my bank intimating them that the cheque in question is with the complainant and the same should not be cleared for payment. I have not informed Police about my quarrel with the complainant. I have instructed my previous attorney to send the reply to the legal notice which EX.CW1/5 however, no reply to this notice on record. I do not remember the exact date when I have asked my previous counsel to send the reply. Vol. I was out of Delhi when legal notice was sent to my house. My previous counsel had told me that he has sent the reply to the legal notice which is EXCW1/5. It is correct that I have not filed any complaint against the complainant once I have received the legal notice from the complainant. It is incorrect to suggest that I have never made the payment of Rs.2,70,000/- to the complainant. It is wrong to suggest that I had not given Rs. 70,000/- in cash to the complainant through my brother Pummy and Mr. Shailesh Sharma. Further it is wrong to suggest I have not deposited the amount of Rs.1,50,000/- in the bank account of the complainant. Also It is wrong to suggest that I have not made the payment of Rs.50,000/- into joint account of daughter and wife of the complainant. Further It is wrong to suggest that I have

not made the payment of Rs.15,000/- by way of cheque to the complainant. It is wrong to suggest that I had taken the sum of Rs.1,00,000/- both in March 2011 and April 2011 from the complainant. It is wrong to suggest that I have issued two cheques in discharged of liability of abovementioned amount. It is wrong to suggest that I have not repaid the abovementioned amount to the complainant as I had not taken any loan. It is wrong to suggest that I have concocted a false story about loan from the complainant in the year 2009-10. It is correct that no document in support of loan transaction between me and the complainant in the year 2009-10. It is wrong to suggest that I have not made any payment to the complainant. It is further cross I am deposing falsely.”
(underlining supplied)

16. Perusal of the testimony of Respondent No. 1 and his cross examination shows that Respondent No. 1 has failed to rebut the legal presumption that arises in view of several admissions made by him.

17. The Trial court had held and rightly so that Respondent No. 1 had not placed any document on record to show as to how and when the said amount was repaid. He could only prove that a sum of Rs. 20,000/- was paid, which amount was also explained by the Petitioner as representing a different loan transaction of Rs.20,000/-. When confronted with the statement of account of daughter and wife of the Petitioner, Respondent No. 1 could not explain the amounts deposited by him.

18. Neither any document nor any independent witness from the bank was produced to show that any amount had been deposited by

him in the bank account of the Petitioner or his wife and daughter. On the other hand he admitted in his cross-examination that he used to deposit money for membership of committee which supports the explanation of the petitioner that the amount of Rs. 20,000/- was towards an independent transaction. Further Respondent No. 1 did not even examine his brother who is alleged to have paid Rs.70,000/- to the petitioner. Respondent No. 1 also could not give the details of the payments made and the respective dates or amounts.

19. No evidence was produced by Respondent No. 1 to show that the subject cheques were issued in the year 2009 – 2010. Respondent No. 1 failed to even show that he had demanded the return of the subject cheques, when he is alleged to have repaid the loan amount. Even the statutory demand notice was not responded to.

20. Further, the reasoning of the Appellate Court has been clouded by the fact that the date printed on the subject cheques was ____/____/200____ which as per the Appellate Court was sufficient suspicious circumstance to rebut the legal presumption that arises in favour of the Petitioner. The Appellate Court failed to appreciate that no evidence had been led by Respondent No. 1 to show that the cheques had not been issued in the year 2011. The appellate Court has failed to notice that Respondent No. 1 in his testimony has not even deposed that the cheques were issued prior to 01.01.2010. Merely because a cheque book is printed prior to 01.01.2010, does not imply that the said cheque book cannot be used after 01.01.2010.

Merely because a cheque book with printed date “___/___/200___” is used after 01.01.2010 would not invalidate the cheque or become a suspicious circumstance in itself. Clearly the reasoning of the Appellate Court on this count is also perverse and untenable.

21. The Appellate court has clearly erred in reversing the well reasoned judgment of the Trial Court. Accordingly, the impugned order dated 26.09.2015 of the appellate court setting aside the order of conviction dated 24.07.2015 and order on sentence dated 31.07.2015 and acquitting respondent no. 1, is not sustainable.

22. The impugned order dated 26.09.2015 is set aside. The order of conviction dated 24.07.2015 and order on sentence dated 31.07.2015 of the Trial Court is restored. The Petition is allowed.

23. Respondent No. 1 is accordingly directed to surrender before the Trial Court on 17.04.2018 to undergo the sentence.

24. Order Dasti under the signature of the Court Master.

SANJEEV SACHDEVA
(JUDGE)

APRIL 2nd, 2017
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