

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

+ **Date of Decision: 21.01.2015**

% **CRL.L.P. 102/2014**

PREDEEP KUMAR VERMA Petitioner
Through: Ms. Anjana Prabhakar, Mr. Naroj
Kumar Sahu, Advocates along with
petitioner in person.
versus

APARNA MEHRA & ANR Respondents
Through: Mr. Samrat Nigam, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (ORAL)

1. The present leave to appeal has been preferred under Section 378(4) Cr PC in respect of the judgment dated 03.12.2013 passed by Ms. Pooja Talwar, learned Metropolitan Magistrate, NI ACT 02/South, Saket Courts, New Delhi in CC No.827/2010 in Pradeep Kumar Verma v. Aparna Mehra, by which the respondent/accused has been acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act).

2. The case of the petitioner/complainant was that he had advanced a friendly loan of Rs.2,24,800/- in cash to the accused. The cheque in question bearing no.383933 dated 24.08.2005 drawn on HDFC Bank had been issued by the accused for the said amount of Rs.2,24,800/- in discharge of her said legal liability. The said cheque had been dishonoured upon presentation with the remarks "Insufficient Funds". After service of

statutory legal notice, and lapse of time for making payment – during which period no payment was made, the complaint had been preferred.

3. The respondent/accused had pleaded not guilty and sought trial. The petitioner examined himself as CW-1 and proved several documents as Ex. CW-1/A to CW-1/E. The statement of the accused was recorded under Section 313 Cr PC, when all the incriminating circumstances were put to her. She stated that she had given two cheques to one Sh. Rahul Gambhir as security for obtaining a car loan which was never disbursed. Sh. Rahul Gambhir, probably, gave these two cheques to the complainant. She stated that she had no concern with the complainant and that she had no liability to make payment to the complainant. She claimed that the complainant had misused the cheques that she had given to Rahul Gambhir. She claimed that the case filed against her was false.

4. Thus, the accused admitted her signatures on the cheques Ex. CW-1/A and that the same had been dishonoured upon presentation. The Trial Court, therefore, drew the presumption under Section 139 of the Act against the accused that the said cheque had been issued in discharge of a legal debt.

5. The accused examined four witnesses, namely, Sh. Nishant Mehra, DW-1 – her husband; herself as DW-2; Sh. Rahul Gambhir, the common friend of the parties as DW-3, and; Sh. Varun Yadav, Sr. Manager, Axis Bank as DW-4. All of them were cross examined by the complainant.

6. The reasoning found in the impugned judgment is as follows:

“14. Having heard the arguments advanced by both the parties, I am of the considered opinion that the complainant in his complaint as well as evidenciery affidavit only stated that the loan was advanced to the accused as she needed some financial help. The same has been changed in the cross examination and it is stated that the amount was required by the accused for repayment of loan. The accused has tried to refute the said allegations by producing the bank statement as well as salary slip of her husband which shows that the laon amount was regularly paid from the salary of the husband of the accused.

15. The loan was taken by the husband of the accused in the year September, 2004 and the alleged loan was given by the complainant to the accused as stated in cross examination February, 2005. The bank statement of the husband of the accused would show regularly amount was being deducted from the salary account, therefore, they would not require any other loan in between.

16. To my mind if actually a further loan for repayment of the bank loan was required, it should have been taken either in the beginning of the instalments of the repayment of loan i.e September, 2004 or towards the completion of loan instalments when actually the deficit amount of Rs. 2,00,000/approximately was to be paid.

17. It is not the case of the complainant that loan from the bank was to be repaid in lumpsum, rather it was being paid in instalments, therefore, the need of money could not have arisen in between.

18. The argument of the complainant's counsel that the first cheque of the instalment was dishonoured would not be of any rescue to the complainant for the reason the husband of accused was a salaried man and he was regularly receiving his salary and even the loan was not taken from complainant at that point of time.

19. The complainant in his complaint in Para 3 has stated that

an advance cheque was issued by the complainant at the time of grant of loan whereas in his affidavit in Para 3, he has stated that "after long pursuation and follow up and in discharge of debt/liability, she issued a cheque bearing No. 383933 dated 24.08.2005." The complainant has not explained these two contradictory statements made by him.

20. All along in his complaint, the accused has talked about one loan as well as issuance of one cheque whereas in his cross examination he has stated that two cheques were taken from the accused. 'The other cheque taken from the accused was a blank cheque. It was taken even without signatures of the accused. I have never presented any other cheque except the cheque in question in my bank for encashment.' This statement of the complainant was further twisted by saying that he has presented another cheque bearing No. 383932 of Rs. 30,000/in his bank. But he could not give a clear answer if a legal notice was sent pertaining to that cheque. However, a copy of legal Ex.CW1/DA notice received by the accused is placed on record.

21. Having admitted the cheque bearing No. 383932 of Rs. 30,000/, complainant has further corroborated the defence of the accused that she had given a cheque of Rs. 30,000/to Rahul Gambhir to be given to the complainant. The contents of the cheque were filled by the accused in her handwriting. The complainant in his earlier statement had denied having received this cheque of Rs. 30,000/and had only stated that he had given one loan of Rs. 2,24,800/to the accused.

22. The complainant further down in his cross examination, has stated that he has filled the contents of the cheque in question himself except the signatures of the accused. Having admitted the contents being filled by the complainant, he has further corroborated the stand of the accused that one cheque was given in blank to Rahul Gambhir to be given to the complainant.

23. In case the averments of the complainant were to be

believed that he had given a loan of Rs. 2,24,800/to the accused then why he had not disclosed having received another cheque of Rs. 30,000/from the accused. This creates a doubt on the averments of the complainant and further substantiates the defence of the accused.

24. The complainant admittedly was not an Income Tax Assesee at the relevant period and has also stated in his cross examination that a substantial amount i.e Rs. 2,10,000/has been lent by his brother but he had not been produced as witness by the complainant.

25. The onus of proving the financial capacity to lend money was on the complainant which he has failed to prove. In case he had actually taken such amount from his brother, he should have stepped into witness box and proved the same. Time and again, it has been held by higher Courts that in case, the money was borrowed by the complainant and further lent to the accused, burden is upon him to prove that from where such amount was arranged. The judgments cited by the counsel for the accused i.e Pawan Singhal Vs Gauri Shankar Deora & Anr, Crl, L.P. No. 228/2011 to Crl. L.P. 232/2011, M. Palanisamy Vs. K. Karvannan, Criminal Appeal No. 1204 of 2004, Dilipbhai Chimanbhai Patel Vs. Haji Shabbirbhai Hasanbhai Vora, Criminal Appeal No. 222 of 2011 and Vipul Kumar Gupta Vs. Vipin Gupta, Crl. L.P. 461 of 2011 would come to the rescue of the accused.

26. All along, the complainant has given the contradictory versions. In the complaint as well as affidavit, it is mentioned that the cheque was issued to the accused to meet her financial requirements which was further improved to repayment of home loan amount. Secondly, date on which the amount was given has not been mentioned by the complainant either in his complaint or in his affidavit. It has been mentioned in the complaint that the cheque in question was given as a post dated cheque at the time of grant of loan whereas in the affidavit, it is stated that after much persuasion, the accused handed over the cheque in question to the complainant after expiry of six

months. Thirdly, there is mention of only one cheque and one loan in the complaint. Then comes the theory of one cheque i.e cheque in question as well as other blank cheque which was even without signatures, which is later on denied by the complainant, then the story of cheque in question as well as cheque of Rs. 30,000/-. These contradictions have not been explained by the complainant which further create a doubt in the story of the complainant.

27. It would now be pertinent to mention that the accused on the contrary, has tried to prove her defence by producing two defence witnesses i.e her husband as well as one Rahul Gambhir. Rahul Gambhir has fully corroborated the defence of the accused. He has accepted that the cheque was taken by him from the accused and given to the complainant and he did not insist the complainant to return the same when the deal was not materialized as he had cordial relations with the complainant at that time and he was not apprehending the misuse of the said cheque.

28. Rahul Gambhir is an independent witness and his testimony requires to be given due credit. In this regard, I would quote the judgment titled as Raj Singh Vs. State (N.C.T of Delhi) CrI. Rev. P. 365/2007) in which it has been held that "11. A different yardstick cannot be put for determining the credibility of a defence witness and in the absence of any cogent and convicting reason, the testimony of defence witnesses is not to be rejected." There is no reason to disbelieve the testimony of Rahul Gambhir since he has passed the test of cross examination and has corroborated the defence of the complainant.

29. The contradictions in the testimony of complainant and most importantly the non explanation of cheque of Rs. 30,000/by the complainant creates a doubt in the case of the complainant. Even otherwise, the complainant is expected to prove the case against the accused beyond reasonable doubt. A serious doubt is created even about the advancement of loan for the fact that the complainant was neither an Income Tax

Assesee nor has proved other source from which allegedly amount was advanced.

30. On the contrary, accused has been able to prove her defence both by discrediting the testimony of the complainant as well as examining the defence witnesses who have corroborated her case”.

7. The submission of learned counsel for the petitioner is that the fact that the accused did not respond to the legal notice under Section 138 of the Act is a pointer to the fact that she was indebted to the complainant, and that the cheque had been issued to discharge a legal debt, and that the dishonour of the said cheque had resulted in the commission of an offence under Section 138 of the Act. Learned counsel submits that in his cross examination conducted on 26.09.2013, DW-1 had admitted that the complainant, Sh. Rahul Gambhir and he, i.e. DW-1 were common friends and used to meet on regular basis earlier. He had also admitted that in those meetings, Saloni Mehra, wife of Rahul Gambhir – who was also a colleague of DW-1, and the accused had joined. However, DW-2, the accused in her examination in chief said *“I do not know the complainant and have seen him for the first time in the Court itself”*. Thus, learned counsel for the petitioner submits that neither DW-1, nor DW-2 were credible witnesses and their evidence was liable to be discarded.

8. Learned counsel further submits that the accused had taken the personal loan since the accused and her husband were finding it difficult to make their ends meet as they had obtained a housing loan, and after payment of monthly instalments, not enough was left to meet the day to day expense of the accused and her husband. Learned counsel has sought to

place reliance on the judgment of the Supreme Court in ***Rangappa v. Sri Mohan***, (2010) 11 SCC 441 to submit that since the accused had admitted her signatures on the cheque in question, the legal presumption arose under Section 139 of the Act.

9. Learned counsel submits that the accused had not been able to establish that the defence set up by her, namely, that the cheque in question had been handed over to Rahul Gambhir, DW-3 for obtaining a car loan was a probable one, as there was no receipt taken when the cheque was allegedly handed over to Rahul Gambhir. Learned counsel submits that Rahul Gambhir himself is an accused in several cases and had been declared as a proclaimed offender and was not worthy of credit insofar his testimony is concerned.

10. Learned counsel has also sought to place reliance on the judgment of the Kerala High Court in ***Joseph Jose V. J. Baby & State of Kerala***, 2002 CriLJ 4392 to submit that merely because in the complaint the details of the original transaction had not been disclosed, the same was not fatal to the complaint. However, the learned trial Court has resorted to hair splitting while observing that the complainant had stated in his complaint, as well as evidentiary evidence, that a loan was advanced to the accused as she needed some financial help, whereas in the cross examination the complainant had stated that the same was required by the accused for repayment of loan. Learned counsel submits that there was no contradiction or shifting of stand by the complainant in the aforesaid circumstance.

11. Lastly, learned counsel for the petitioner has sought to place reliance on the decision of this Court in *V.S. Yadav v. Reena*, 172 (2010) DLT 561 to submit that a mere statement of the accused under Section 311 or Section 281 Cr.P.C. pleading “not guilty” was not sufficient to rebut the evidence produced by the complainant/prosecution. In order to rebut the presumption under Section 139 of the Act, the accused has to lead cogent evidence to prove the circumstance under which the cheque was issued. It was for the accused to prove that, if no loan was taken, why he did not write a letter to the complainant (in this case to Rahul Gambhir, as it is claimed that the cheque had been delivered to Rahul Gambhir) for return of the cheque. Learned counsel submits that the accused had not acted like a normal businessman/prudent person entering into a contract. Thus, the respondent had not rebutted the presumption under Section 139 of the Act. If no loan was taken by the accused but cheques had been retained allegedly by Rahul Gambhir, the accused should have immediately protested and asked for return of the cheques, and if cheques were still not returned, a notice should have been served to Rahul Gambhir. However, no such steps were taken in the present case.

12. On the other hand, learned counsel for the respondent/accused has supported the impugned judgment. Learned counsel for the respondent submits that the accused had raised a probable defence and thus the presumption under Section 139 of the Act stood rebutted. Learned counsel submits that this Court while hearing the present leave petition would not interfere with the impugned judgment since the Trial Court has accepted one of the two possible views, and acquitted the accused. This Court would

grant leave to appeal against a judgment of acquittal only if the judgment under appeal is found to be perverse or based upon misreading of the evidence. Merely because the Appellate Court may be inclined to take a different view would not be a reason calling for interference. Learned counsel has sought to place reliance on the following extract from ***Guru Nanak Tractors v. Swarn Singh***, 2014 (3) RLR (CRI) 601 in this regard:

“8. *Their Lordships of the Supreme Court in 'Allarakha K. Mansuri v. State of Gujarat, 2002 (1) RCR (Cri) 748', held that where, in a case, two views are possible, the one which favours the accused, has to be adopted by the Court. This view has been reiterated in State of Goa v. Sanjay Thakran, (2007) 3 SCC 755', and 'Chandrappa v. State of Karnataka, (2007) 4 SCC 415'.*

9. *A Division Bench of this Court in 'State of Punjab v. Hansa Singh, 2001(1) RCR (Cri) 775', while dealing with an appeal against acquittal, has opined as under:-*

“We are of the opinion that the matter would have to be examined in the light of the observations of the Hon'ble Supreme Court in Ashok Kumar v. State of Rajasthan, 1991 (1) SCC 166, which are that interference in an appeal against acquittal would be called for only if the judgment under appeal were perverse or based on a misreading of the evidence and merely because the appellate Court was inclined to take a different view, could not be a reason calling for interference”

In Mrinal Das & others v. The State of Tripura, 2011 (9) SCC 479', decided on September 5, 2011, the Hon'ble Supreme Court, after looking into many earlier judgments, has laid down parameters, in which interference can be made in a judgment of acquittal, by observing as under:

“An order of acquittal is to be interfered with only when there are "compelling and substantial reasons", for doing so. If the order is "clearly unreasonable ", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed.

10. Similarly, in the case of 'State of Rajasthan v. Shera Ram alias Vishnu Dutta, (2012) 1 SCC 602', the Hon'ble Supreme Court has observed as under:-

“7. A judgment of acquittal has the obvious consequence of granting freedom to the accused. This Court has taken a consistent view that unless the judgment in appeal is contrary to evidence, palpably erroneous or a view which could not have been taken by the court of competent jurisdiction keeping in view the settled canons of criminal jurisprudence, this Court shall be reluctant to interfere with such judgment of acquittal.

8. The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of

acquittal, but otherwise such interference is not called for”.

11. Thereafter, in the above case a large number of judgments were discussed and then it was opined as under:-

“10. There is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on the other. The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice, where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience”.

13. Learned counsel for the respondent submits that even though the complainant sought to improve his case – that out of the amount of Rs.2,48,800/-, Rs.2,10,000/- had been lent by the complainant’s brother, the complainant did not examine his brother as a witness. The complainant himself was not even possessed of the requisite liquidity to advance the alleged loan of Rs.2,48,800/-.

14. Learned counsel further submits that, in fact, two cheques had been taken by Rahul Gambhir, one of which was for Rs.30,000/- and the other was the cheque in question. The complainant had misused the cheque of Rs.30,000/- by depositing the same in his account which, too, had been dishonoured upon presentation. However, no action was initiated by the complainant in respect of the said cheque. Learned counsel submits that if the loan advanced was Rs.2,48,800/-, as claimed by the complainant, the purpose of issuance of another cheque of Rs.30,000/- bearing no.383932 has not been explained.

15. Having heard learned counsels, I am of the view that the petitioner has not been able to satisfy the tests for grant of leave against the judgment of acquittal.

16. No doubt, there is merit in the submission of learned counsel for the petitioner – that merely because the complainant had stated in the complaint and the evidentiary affidavit that the loan was advanced to the accused as she needed financial help, and subsequently on cross examination the complainant had stated that the amount was required by the accused for repayment of loan, it does not amount to a change of stance. To say that the accused needed financial help would take within its scope financial help for repayment of loan.

17. I am also in agreement with the submission of learned counsel for the petitioner qua the reasoning adopted in paras 15 to 18 of the impugned judgment. The reasoning adopted in para 15 to 18 and in the initial part of para 26 do not impress me. Merely because the husband of the accused had

taken a housing loan from the Bank in September 2004, it does not follow that the accused was unlikely to take a loan from a third party – such as the complainant, thereafter (In this case, the complainant had claimed that the loan had been advanced in February 2005). There is no basis to hold that the loan from the complainant should have been taken either at the beginning of the instalment of repayment of the housing loan, i.e. September 2004, or towards completion of loan instalments when the deficit amount of Rs.2 lacs was to be paid. A party in need of financial help may avail of a loan at any time, and on such considerations a doubt cannot be thrown on the case of a complainant.

18. At the same time, there are several other reasons given by the Trial Court for holding that the accused had set up a probable defence and that the offence was not proved beyond reasonable doubt. There is inconsistency in the stand of the complainant with regard to the time when the cheque in question had been issued. While the complainant claimed in para 3 of his complaint that the cheque in question had been issued at the time of grant of loan (i.e. February 2005), in his affidavit, the complainant stated that the cheque in question dated 24.08.2005 had been issued after long persuasion and follow up. This, to my mind, was an aspect which went to the root of the matter and cannot be brushed aside as a minor contradiction or deviation.

19. As aforesaid, there was another cheque of Rs.30,000/- of the accused with the complainant, which the complainant had banked and which had been dishonoured upon presentation. It has not been explained on what account the said cheque was issued – if the total loaned amount was

Rs.2,48,800/- for which the cheque in question had been issued. In his cross examination, the complainant had initially denied presenting any other cheque, except the cheque in question in his bank for encashment. However, he had later admitted to have presented the cheque for Rs.30,000/- to his bank. Though, initially, he stated that he did not remember whether he issued a legal notice regarding dishonour of the said cheque of Rs.30,000/-, he was confronted with Exh. CW-1/DA, which was the legal notice dated 20.10.2005 issued by the complainant's advocate to the accused.

20. Learned counsel for the complainant has produced a photocopy of the said notice in the course of her submissions, which is taken on record. A perusal of the same shows that in this notice, the complainant only claimed that the accused had been granted a friendly loan of Rs.30,000/- for repayment of which the cheque for Rs.30,000/- bearing no.383932 dated 30.09.2005 drawn on HDFC Bank, Vasant Vihar, New Delhi had been issued.

21. The Trial Court, in my view, was right in doubting the complainant's version of advancing the amount of Rs.2,24,800/-, when the complainant was not even an income tax assessee at the relevant time. He had stated that Rs.2,10,000/- out of the said amount had been lent by his brother, but the complainant did not produce his own brother as a witness. Pertinently, Rahul Gambhir, who was a common friend of the parties, had been produced as a witness by the accused. Rahul Gambhir, DW-3 had completely supported the case of the accused.

22. In the light of the aforesaid discussion, it cannot be said that the view taken by the Trial Court is a perverse view, or that the Trial Court has not appreciated the evidence correctly. The accused having been acquitted, the presumption of innocence stands fortified. I, therefore, find no merit in this petition and dismiss the same.

VIPIN SANGHI, J

JANUARY 21, 2015

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