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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 12th May, 2015

+ CRL.A. 1125/2013

COL. R.P.MENDIRATTA

..... Appellant

Through: Mr K.K. Manan, Mr Nipun
Bhardwaj and Mr Ankush Narang,
Advts.

versus

SANDEEP CHOUDHARY

..... Respondent

Through Mr Jitendra Jain and Mr Syed
Akhtar, Advts.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This is an appeal u/s 378(4) Cr.P.C filed by the appellant, feeling aggrieved by the judgment dated 26.05.2012 passed by the learned Metropolitan Magistrate whereby the respondent/accused was acquitted in complaint case No.1291/1/10 for offence u/s 138 of Negotiable Instruments Act(hereinafter referred as NI Act), 1881.

2. The appellant/complainant filed a complaint u/s 138 of NI Act inter alia on the allegations that he had given a loan of Rs. 44 lakhs to the accused in May, 2004 which was to be returned after a period of 3 months along with interest at the rate of 4% per month. The accused, however, failed to comply with the terms and did not make the payment within time along with interest. In partial discharge of his liability, the accused issued 3 cheques Ex.CW1/A to Ex.CW1/C bearing No.759028 dated 02.08.2004

for a sum of Rs.4,50,000/-; cheque bearing No.655987 dated 08.09.2004 for a sum of Rs. 5 lakhs and third cheque bearing No.655989 dated 17.09.2004 for a sum of Rs. 4 lakhs, all drawn on State Bank of India, Central Market, Lajpat Nagar, Delhi in favour of the complainant. On presentation, all the cheques were returned dishonoured with the remarks “Funds Insufficient” and “refer to drawer” vide return memo Ex.CW1/D to Ex.CW1/F dated 18.09.2004 and 27.09.2004. Complainant sent a legal notice Ex.CW 1/G to the accused through his counsel dated 13.10.2004 by registered AD post as well as by UPC Ex.CW 1/H and Ex. CW 1/I respectively. However, the accused failed to make the payment within the stipulated period. Hence the complaint was filed.

3. After the complainant filed his pre-summoning evidence, the accused was summoned u/s 138 of the NI Act. Notice u/s 251 Cr.P.C was served upon him, to which he pleaded not guilty and claimed trial. In order to substantiate his case complainant stepped into the witness box. Statement of accused u/s 313 Cr.P.C read with Section 281 Cr.P.C was recorded wherein he denied having taken any loan from the complainant. According to him the cheques in question were handed over by him to the complainant for construction of property/plot out of the property bearing No.B-1/202 & 203, Lajpat Nagar, Delhi. He denied having received any legal notice of demand and preferred to lead defence evidence. He examined three witnesses in his defence.

4. After hearing learned counsel for the parties, the learned Trial Court observed that the signatures on the cheques and issuance of the same to the complainant was admitted by the accused. Therefore, the execution of the cheques stands duly proved. Once the execution of the cheques stands duly proved, the presumption of law u/s 118 and 139 of NI Act come in

favour of the complainant and the initial burden of proof shifts upon the accused. As regards service of legal demand notice issued by the complainant, the plea of the respondent that the same was never received by him as the report on the envelope Ex.CW1/J is to the effect “unclaimed” did not find favour with the learned Trial Court who relied upon *C.C.Alavi Haji v. Palapetty Muhammed and Another*, (2007) 6 SC 555 for observing that since the accused does not dispute his address written on the postal card/envelope, the service of legal notice can be deemed to have been effected. Moreover, the accused appeared before the Court upon service of summons on the same address. However, the plea of the accused that the cheques in question were never issued for repayment of any loan as the accused has never taken any loan from the complainant and the cheques were issued for the purpose of construction of property by the complainant found favour with the learned Trial court who noted various infirmities and contradictions in the statement of the complainant. It was observed that the accused was only expected to rebut the presumptions of law on the scale of preponderance of probabilities and was not required to prove his defence beyond reasonable doubt. Once the accused was able to rebut the presumptions by examining three witnesses, it was for the complainant to prove that there was any existing debt or liability which the complainant failed to prove, as such the accused was acquitted. Feeling aggrieved, the present appeal has been preferred.

5. Assailing the findings of learned Trial Court, learned counsel for the appellant submitted that the findings of the learned Trial Court are contradictory. Having admitted the fact that the cheque was issued by the accused in favour of the complainant, presumption u/s 118 and 139 of NI Act goes in favour of complainant and the burden shifted upon the accused

who failed to prove the same. Under the circumstances it was submitted that the impugned judgment is perverse and same be set aside.

6. Per contra, it was submitted by learned counsel for the respondent that this is an appeal against acquittal. That being so, the view taken by the learned Trial Court should not be disturbed except under extraordinary circumstances. There is a presumption of innocence in favour of the accused which stands reinforced by the verdict of acquittal passed by the learned Trial Court in his favour. Moreover, the accused examined three witnesses who were none else but the partner, taxation consultant and the record clerk of the bank of the complainant and by examining these three witnesses, coupled with the cross examination of the complainant, the respondent was able to rebut the presumption and the onus shifted upon the complainant to prove that there was an existing debt or liability towards which the cheques in question were given. It was submitted that the complainant has miserably failed to prove the source of funds as at one place he has taken the plea that the payment of Rs. 44 lakhs was given to the accused out of his own funds while at another place it was alleged that the money belonged to his brother-in-law and since it was lying with him, he had given the same to the accused. The accused had even tried to call the brother-in-law of the complainant as a defence witness and since he was residing out of India, he also deposited a sum of Rs.80,000/- towards his travel expenses. He appeared on one date but the Court was on leave, therefore, he went back. Thereafter he could not secure his presence. Even otherwise, the witness was none else but the brother-in-law of the complainant and even if the accused did not succeed in examining him, nothing prevented the complainant from examining him in order to prove that the money belonged to him. It was further submitted that as per the bank statement, the complainant was not having sufficient funds in his

account. Even the income tax return for the relevant periods were not filed, as such the complainant failed to prove the source of payment of this huge amount. Moreover, no documents for giving loan of Rs. 44 lakhs was executed. The allegations are quite vague, inasmuch as it is not disclosed as to when Rs. 44 lakhs was given and in how many instalments. Further the three cheques were for a sum of Rs. 13 lakhs approximately. However, no civil suit was filed by the complainant for recovery of remaining amount. In cross examination, complainant stated that promissory note was executed, however, the same was not produced. Under the circumstances, learned counsel submits that the complainant failed to prove that the cheques were given in discharge of any existing debt or liability. Therefore, the learned Metropolitan Magistrate was justified in acquitting the accused, which findings does not call for any interference. The appeal is devoid of merit and as such the same be dismissed.

7. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record.

8. A perusal of the pleadings of the parties reveals that there is no dispute that the three cheques Ex. CW1/A to Ex.CW1/C drawn on State Bank of India, Central Market, Lajpat Nagar, Delhi were issued by the respondent-accused in favour of the complainant and on presentation all the cheques were returned dishonoured with the remarks “funds insufficient” and “referred to drawer”. The basic dispute is regarding service of legal notice Ex.CW1/G upon the accused and whether the cheques were given in discharge of any existing debt or liability.

9. As regards service of legal notice, the same was sent by the complainant through his counsel by way of registered A.D post as well as

UPC Ex. CW1/H and Ex.CW 1/I respectively. The notice sent by registered post was received back with the report on the envelope Ex.CW1/J “unclaimed”. On the basis of this report, learned counsel for the respondent submitted that the notice was never received by the respondent accused. However, this plea was rightly not accepted by the learned Trial court in as much as the notice by registered post as well as UPC was sent on the correct address of the drawer, as such a presumption of service u/s 27 of General Clauses Act and illustration(b) of Section 114 Evidence Act arises that the notice must have reached the addressee. The presumption, however, is rebuttable. The onus was upon the accused to rebut the presumption that normal course of business was disrupted, which he failed to rebut. Moreover, summons of the complaint were received by the accused on the same address and he appeared in the Court. That being so, the plea of non-service of legal notice is not tenable.

10. Before coming to the second plea as to whether the cheque was given in discharge of any existing debt or liability, it will be in the fitness of things to reproduce Section 138 and 139 of NI Act which reads as under:-

“138. Dishonor of cheque for insufficiency, etc., of funds in the accounts

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 honor 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 provisions of this Act, be punished with imprisonment for a term which may extend to one year, 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-

(a) 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.

(b) 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) 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 purpose 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, or any debt or other liability."

11. A bare reading of Section 138 of the Act goes to show that it has three ingredients, viz:-

- (i) that there is a legally enforceable debt;
- (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and
- (iii) that the cheque so issued had been returned due to insufficiency of funds.

12. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138,

there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is *sine qua non* for bringing an offence under Section 138.

13. The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

14. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different. Whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is 'preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies.

15. In ***Bharat Barrel & Drum Manufacturing Co. v. Amin Chand Payrelal***, [1999]1SCR704 while interpreting Section 118(a) of the Act, the Hon'ble Supreme Court opined:

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note

is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen' with a doubt....[Emphasis supplied]

16. In *M.S. Narayana Menon Alias Mani v. State of Kerala and Anr.* , 2006 Cri LJ 4607 , it was held that once the accused is found to discharge his initial burden, it shifts to the complainant.

17. In *K. Prakashan v. P.K. Surenderan* , (2008)1SCC258, Hon'ble Supreme Court following *M.S. Narayana Menon* (supra) opined:

12. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118(a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118(a) and 139 are rebuttable in nature. Having regard to the definition of terms, 'proved' and 'disproved' as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

13. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."

18. Similar view was taken in *Kumar Exports v. Sharma Carpets*, (2009) 2 SCC 513; *Kamala S v. Vidyadharan M.J and Anr.*, (2007) 5 SCC 264; *Birender Singh v. State(NCT of Delhi & Anr.)*, JCC 1(2008)15 and *S.S. Chouhan v. State & Anr.*, 2012 III AD(Delhi) 545.

19. As observed by Hon'ble Supreme Court in *Krishna Janardhan Bhat v. Dattatraya G. Hegde*, AIR 2008 SC 1325, the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

20. In view of the decisions referred above for discharging the burden which lay upon the accused, the accused was not required to step into the witness box. However, he was able to discharge his burden on the basis of material already brought on record inasmuch as there were several material infirmities and contradictions in the testimony of the complainant. At one stage, the appellant stated that his brother-in-law Sharad Mehta, a resident of USA had sold one property in DLF phase I and got about Rs.60-65 lacs which was lying with him and out of that money, he paid

money of Rs.44 lacs to the accused. At other place, he took the plea that the funds were arranged by him from his own construction business which had two partners. Besides him, one Mr. S.K.Arora was also his partner. Mr. S.K.Arora was examined by the respondent as DW1 who deposed that there was no partnership firm between him and the appellant but they were doing work together. He further deposed that, he and the appellant were doing the work of construction of properties during the period 1989 to 1999 and thereafter no business was carried out. No books of accounts were maintained. Respondent also summoned DW3 Ramesh Sethi who was filing income tax return of the complainant since 1999. He proved the income tax returns for the year 2003-2004 and copy of the statement of income, balance sheet of the appellant Ex.DW1/A and further deposed that he had not filed the income tax return for the assessment year 2004-2005. According to him the documents Ex.PW1/A does not show any income from any business of the appellant. Even DW2 Sh. K.K.Notiyal, clerk of Canara Bank, Safdarjung Development Area brought the statement of account of appellant Ex. DW 2/A which reflected that there was no big entries which could show that the appellant was having huge amount in his bank so as to lend it to the respondent. No documentary evidence was produced by the appellant to show that such a huge amount was given as loan to the respondent either in the form of loan agreement or receipt against payment. The appellant being a retired government officer have been filing income tax return regularly but he did not file the return for the year 2004-2005 in which he could have disclosed the loan transaction. No record pertaining to advancement of loan has been maintained by him in his account books maintained for the construction of his business. In cross examination he stated that promissory note was executed and the same was used in other recovery case but then he stated that he did not file any such case, meaning thereby, the best evidence in the form of promissory note

was in power and possession of the appellant which he failed to produce. As such adverse inference has to be drawn against him for withholding the important document. Moreover, as per Section 269(ss) of Income Tax Act, any loan to be advanced by one person to another for more than Rs.20,000/- must be by way of cheque and the plea of giving such a huge amount of Rs.44 lakhs in cash does not inspire confidence, more particularly, in view of the fact that the bank statement of the complainant does not reflect that he was having sufficient funds. No income tax returns were filed. No statement of accounts were filed to prove the transaction. Moreover, the respondent took the risk of summoning the brother-in-law of the complainant by way of defence evidence, thereby incurring an expense of Rs.80,000/- towards his travel expenses and although the witness did come but could not be examined due to non availability of the Presiding Officer and thereafter his request to call this witness was declined but the complainant could have summoned him to prove that the amount belonged to his brother-in-law or that it was lying with the complainant which was given to the respondent. Furthermore the three cheques were for a sum of Rs.13 lakhs approximately. Surprisingly no steps were taken by the appellant to recover the balance amount of Rs.30,50,000 from the respondent. Under the circumstances, from the cross examination of the complainant as well as the three defence witnesses examined by him, the respondent was able to discharge the burden of proof placed upon him and thereafter the burden shifted upon the complainant to prove that the cheques were issued in discharge of an existing debt or liability, which in view of the discussions made above, the complainant failed to discharge. The learned Trial Court by a well reasoned judgment has acquitted the accused and the findings does not fall for interference.

21. Moreover, this is an appeal against an acquittal order and the law regarding appeal against acquittal is by now well settled. In

Muralidhar@Gidda and Another v. State of Karnataka, (2014) 5 SCC 730, Hon'ble Supreme Court referred to the earlier decisions in para 10,11,12, and 13 which are reproduced as under:-

10. Lord Russell in *Sheo Swarup v. King Emperor*, AIR 1934 PC 227], highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said, "... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." The opinion of the Lord Russell has been followed over the years.

11. As early as in 1952, this Court in *Surajpal Singh v. State*, AIR 1952 SC 52] while dealing with the powers of the High Court in an appeal against acquittal under Section 417 of the Code of Criminal Procedure observed, ".....the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in *Tulsiram Kanu v. State*, AIR 1954 SC 1], *Madan Mohan Singh v. State of U.P.*, AIR 1954 SC 637], *Atley v. State of U.P.*, AIR 1955 SC 807], *Aher Raja Khima v. State of Saurashtra*, AIR 1956 SC 217], *Balbir Singh v. State of Punjab*, AIR 1957 SC 216], *M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200], *Noor Khan v. State of Rajasthan*, AIR 1964 SC 286], *Khedu Mohton v. State of Bihar*, (1970) 2 SCC 450], *Shivaji Sahabrao Bobade v. State of Maharashtra*, (1973) 2 SCC 793], *Lekha Yadav v. State of Bihar*, (1973) 2 SCC 424], *Khem Karan v. State of U.P.*, (1974) 4 SCC 603], *Bishan Singh v. State of Punjab*, (1974) 3 SCC 288], *Umedbhai Jadavbhai v. State of Gujarat*, (1978) 1 SCC 228], *K. Gopal Reddy v. State of A.P.*, (1979) 1 SCC 355], *Tota Singh v. State of Punjab*: (1987) 2 SCC 529], *Ram Kumar v. State of Haryana*, 1995 Supp (1) SCC 248], *Madan Lal v. State of J and K*, (1997) 7 SCC 677], *Sambasivan v. State of Kerala*, (1998) 5 SCC 412], *Bhagwan Singh v. State of M.P.*, (2002) 4 SCC 85], *Harijana Thirupala v. Public Prosecutor, High Court of A.P.*, (2002) 6 SCC 470], *C. Antony v. K.G. Raghavan Nair*, (2003) 1 SCC 1], *State of Karnataka v. K. Gopalakrishna*, (2005) 9 SCC 291], *State of Goa v. Sanjay Thakran*, (2007) 3 SCC 755] and *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415]. It is not necessary to deal with these cases individually. Suffice it to say that this Court has

consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.

13. In *Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450], the Court has culled out the principles relating to the appeals from a judgment of acquittal which are in line with what we have observed above.”

22. In view of the aforesaid well established principles while hearing the appeal from the judgment of acquittal, coupled with the evidence which has come on record, there is no ground to take a different view and interfere with the judgment of acquittal. Accordingly, the appeal is dismissed. Pending application, if any, stands disposed of. Trial Court record be sent back.

(SUNITA GUPTA)
JUDGE

MAY 12, 2015

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