

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

% *Date of Judgment :29.09.2015*

+ CRL.A. 1566/2013

EVEREST INDUSTRIES LTD.

..... Appellant

Through Mr. Jai Gupta, Mr. Sunita Yadav,
Mr. Rakesh Kumar and Mr. Amit
Verma, Advs.

versus

GULAB MALVIYA

..... Respondent

Through Mr. Ram Bhushan Pandey and
Mr.Niranjan, Advs.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 This appeal is directed against the impugned judgment dated 13.12.2012 wherein the respondent stands acquitted in complaint case No.5203/1 filed by the complainant under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act).

2 The complainant is aggrieved by the said judgment. His submission is that the provisions of the said Act have not been

appreciated in the correct perspective; a presumption had arisen in favour of the complainant and unless and until, this presumption stood rebutted which in this case was not done coupled with the fact that the accused had admitted that he had issued the cheque, the impugned judgment holding that the respondent is entitled to an acquittal suffers from a clear illegality. It is liable to be set aside.

3 Arguments have been refuted by the learned counsel appearing for the respondent. His submission all along is that although he has issued an undated cheque in favour of the complainant yet the goods were not received by him and in the absence of a legally enforceable debt, the ingredients of Section 138 of the said Act are not satisfied.

4 Arguments have been heard. Record has been perused.

5 The complaint had been filed on 14.09.2011. Along with the complaint, the statement of accounts of the complainant (M/s Eternit Everest Ltd) from 01.01.2001 to 31.07.2011 had been placed on record. Prior to filing of the complaint, a legal notice dated 29.07.2001 had been sent to the accused. After the framing of notice, the statement of the complainant on affidavit had been recorded. He was subjected to a

cross-examination. In his evidence by way of affidavit, the complainant had deposed that the accused had issued a cheque bearing No. 695462 dated 23.04.2001 for a sum of Rs.1,23,225/- to discharge its outstanding dues and in support of this, he has also file his statement of accounts (Ex.CW-1/A). In his cross-examination, he admitted that he has no personal knowledge about the supply of goods alleged to have been made by the complainant to the accused; further deposition being that the same must have been supplied from the company's warehouse but he did not know where they were dispatched or even the date of the supply of goods. Further deposition being that the statement of accounts was filed and no other document was supplied with regard to the supply of goods. In the course of this cross-examination on 15.01.2007, the learned Trial Court in view of the objection raised by the accused asked the witness to produce the statement of accounts as also the documents relating to the supply of goods; his cross-examination was deferred and the witness was directed to produce the entire statement of accounts as also the documents relating to the supply of goods. Admittedly no document or statement of account was produced.

6 Learned counsel for the appellant on this score submits that this was not supplied as the record had got destroyed. Ex.CW-1/A which is the statement of accounts has also been perused. This statement of accounts which is w.e.f. 03.01.2001 up to 31.05.2001 has three entries dated 16.03.2001, 30.04.2001 and 31.05.2001 which refers to as 'correction entries'. On a specific query put to the learned counsel for the appellant as to what this refers to, he had no answer. Apart from this document, there is admittedly no other document relating to the supply of goods.

7 This Court notes that the objection of the accused all along was that he has never been supplied the goods and therefore the cheque which he had issued was not a legally enforceable debt. On this count, attention has been drawn to an application (which was listed as an appearance-cum-bail application) filed on behalf of the respondent which was on 28.09.2005 wherein also he had clearly stated that the goods were not supplied by the complainant to the accused till date and therefore the ingredients of Section 138 of the said Act which make a reference to the discharge of a debt or liability never stood established.

Thereafter another application had also been filed by the respondent seeking dismissal of the complaint on the ground that the ingredients of the aforementioned offence for the reason that the same have not been made out. This application was deferred and it was noted that this application shall also be considered at the time of final hearing.

8 The Trial Court while disposing of the complaint in paras 3 to 6 had made certain observations which would be relevant for the disposal of this appeal and read herein as under:-

“The defence of the accused is that he had placed order with the complainant to purchase A.C. sheets and that at the time of placing of order he delivered the present cheque Ex.CW1/B and that the complainant did not supply the A.C. sheets therefore the accused is not liable upon the instrument.

4. In his cross examination CW-1 Sanjay Khanna has deposed that –

‘..... I have no personal knowledge about the supply. I do not know from which warehouse the goods were dispatched..... I do not know the exact date of supply of goods I cannot say by what means of transport the goods were supplied to the accused.’

It is evident from the above testimony of CW-1 that complainant has no clue as to the supply of goods ordered by the accused.

5. The complainant also failed to produce any documents of titled/challan in respect of receipt of goods by the accused, when he was so asked in his cross examination.

6. *The explanation accorded towards the non-production of any document evidencing the receipt of goods by the accused was that the records of the complainant were destroyed in flood which affected Mumbai. The said explanation is not found to be reasonable as CW-1 has deposed that the office was not shifted but records were shifted and failed to adduce any evidence in this respect. Such a state of things is not probable to have existed under normal circumstances.*”

9 This Court also notes the law in relation to interference by a higher Court in a judgment of acquittal. In this context, the observations of the Apex Court in (2010) 6 SCC 1 Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi) are relevant.

“ *The following principles have to be kept in mind by the Appellate Court while dealing with appeals, particularly, against the order of acquittal:*

(i) *There is no limitation on the part of the Appellate Court to review the evidence upon which the order of acquittal is found.*

(ii) *The Appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.*

(iii) *The Appellate Court can also review the Trial Court's conclusion with respect to both facts and law.*

(iv) *While dealing with the appeal preferred by the State, it is the duty of the Appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.*

(v) *An order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.*

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding of the Trial Court are palpably wrong, manifestly, erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) 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 The impugned judgment in this background calls for no interference. The Trial Court had rightly appreciated the fact that the accused had created a dent in the version of the prosecution rebutting the presumption raised by Section 139 of the said Act and the appellant having failed to produce any document (inspite of opportunity) showing that the goods were in fact supplied by him to the accused, the judgment acquitting the respondent calls for no interference.

11 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

SEPTEMBER 29, 2015

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