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

\+ CRL.L.P. 789/2015

YASHPAL SINGH

..... Petitioner

Represented by: Mr. Dalip Singh, Adv.

versus

SUREINDER KAPOOR

..... Respondent

Represented by: Mr. Yog Verdhan, Adv.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

<u>O R D E R</u>

% **17.01.2018**

1. By this petition, the petitioner seeks leave to appeal against the impugned judgment dated 6th October, 2015 acquitting the respondent for offence punishable under Section 138 of the Negotiable Instruments Act (in short the NI Act).

2. A brief background. The petitioner preferred three complaints under Section 138 of the NI Act on the ground that the accused was known to him and in the month of January 2005 due to financial crisis in his business he requested the petitioner to arrange a loan of ₹2,50,000/- for one year and promised to repay the same on or before December 2005. Complainant arranged ₹2 lakhs and in lieu whereof the accused handed-over a post-dated cheque from his account vide cheque No.317565 dated 16th December, 2005 for a sum of ₹2 lakhs drawn on Punjab National Bank, Hari Nagar, New

Delhi in favour of the complainant. On 16th December, 2005 respondent requested the complainant not to present the cheque till April, 2006. The petitioner presented the cheque for encashment which was returned by the bankers vide return memo dated 1st May, 2006 mentioning remarks 'Accounts Closed'. Petitioner sent a legal notice dated 15th May, 2006 through his counsel at both the addresses but the respondent did not repay the loan amount within the prescribed period, hence he filed the complaint. The complainant examined himself as CW-1 and tendered his examination-in-chief by way of affidavit Ex.CW-1/A and deposed on the lines of the complaint. The respondent was summoned and notice was framed on him where after complainant examined himself and relied upon the cheque, bank return memo, legal notice, postal receipt, UPC vide Ex.CW-1/1 to CW-1/5 respectively.

3. After recording of the statement of the respondent he examined himself as DW-1 and deposed that complainant filed a false complaint against him on 4th June, 2005 by calling PCR which matter was compromised. He stated that he had a deal in respect of a property bearing No. D-2/122, Jeevan Park, Pankha Road, Delhi belonging to one Rakesh Sharma. Accused wanted to purchase the said property but the said property was mortgaged by Rakesh Kumar Sharma with Allahabad Bank and Rakesh Sharma had taken 5 post-dated cheques from accused totalling to ₹12,56,000/-. The cheques were signed by the accused but name of payee was not mentioned. Settlement of Rakesh Kumar Sharma with Allahabad Bank could not materialise and when Rakesh Kumar Sharma was coming at the house of the accused to deliver those cheques complainant met him and took him to his house. When Rakesh Kumar Sharma reached the house, the

cheques and documents were missing and thus a complaint was lodged at PS Bindapur in respect of the loss of those cheques. DW-1 exhibited the certified copy of the complaint filed qua the loss cheque and legal demand notice. He also examined Rakesh Kumar Sharma as DW-2 who corroborated his version and DW-3 HC Ram Singh who brought the record of NCR dated 14th March, 2006 in respect of loss of five cheques.

4. Considering the material on record, the learned Trial Court held the accused guilty of offence punishable under Section 138 NI Act vide the judgment dated 9th October, 2013 and passed an order of sentence on 8th November, 2013.

5. Challenging the judgment of conviction and order on sentence, the respondent preferred an appeal before the learned Additional Sessions Judge which was allowed vide order dated 6th October, 2015 holding that the defence led by the respondent was convincing and that 5 cheques which had been allegedly issued to DW-2 Rakesh Kumar Sharma were lost in the transit and were presented for encashment either by the complainant and complaint in this regard was lodged way back on 14th March, 2006. The defence having rebutted the presumption, the onus shifted on the petitioner to give the plausible explanation which it failed to do.

6. In respect of the five cheques purportedly issued in the name of the petitioner or his family members in one of the complaints the learned Metropolitan Magistrate acquitted the respondent against which the petitioner preferred a CRL.L.P. 693/2014 before this Court wherein despite delay this Court examined the petition on merits and held as under:

> *"9. The case of the Complainant (Petitioner) is that the Respondent, who was his family friend, had requested him for a*

loan of Rs.3.36 lakhs as he was in dire need of money. It is stated that the said loan amount was advanced in cash. In discharge of his liability the Respondent is stated to have issued a cheque bearing No. 317562 dated 5th October 2005 in favour of the Complainant. The cheque when presented for payment, was returned dishonoured with the remarks 'Account Closed'. Despite issuance of the legal demand notice, the Respondent failed to pay the sum and the Complaint was filed.

10. In his statement under Section 313 Cr.P.C., the Respondent denied having issued the said cheque to the Complainant. He stated that he had issued cheques bearing Nos. 317561, 317562, 317565, 317566 and 317567 toMr. Rakesh Kumar Sharma, a common friend of Respondent and Complainant, to the tune of Rs.12.56 lakhs in respect of the property bearing No. D2/122, Jewan Park, Pankha Road, Delhi. When the property deal did not materialise, the Respondent demanded that the cheques be returned. However, Mr. Sharma claimed that they had been misplaced. The Respondent alleges that the Complainant subsequently misused one of the cheques due to an enmity arising from an incident where the Complainant was beaten by the Respondent and his son. The Respondent denied having borrowed any loan from the Complainant.

11. The Complainant examined himself as CW-1 and Mr. Rakesh Kumar Sharma, who was examined as DW-1, completely supported the Respondent. The Respondent also examined himself as a witness.

12. The trial Court on an analysis of the evidence found that the Respondent had rebutted the statutory presumptions under Section 118 and 139 of the NI Act. As far as the complaint was concerned, the basic foundational facts were not established. The exact date and the time of loan advancement and its duration were not mentioned either in the complaint, nor in the legal notice nor even in the affidavit of evidence. Further, the trial Court observed that in fact an incident had taken place on

4th June 2005 when the Complainant was allegedly beaten up by the Respondent and his son. Subsequently, they arrived at a compromise at the police station. The documents in this regard were exhibited as Ex. CW-1/D1. It created further doubt on the existence of the alleged loan transaction between the Complainant and the Respondent around the same time.

13. Having heard the learned counsel for the Petitioner and having perused the impugned judgment of the trial Court, this Court is not inclined to hold that any error has been committed by the trial Court in holding that the Respondent has rebutted the statutory presumption under Section 118 and 139 of the NI Act on preponderance of probabilities and that he should be given the benefit of doubt.

14. No grounds have been made out for grant of leave to appeal. The petition and the application are dismissed."

7. In view of the NCR recorded by the respondent and the version of respondent duly corroborated by DW-2 Rakesh Kumar Sharma and DW-3 HC Ram Singh, the view taken by the learned Additional Sessions Judge that the respondent has rebutted the presumption and thereafter the petitioner has failed to discharge the onus to prove his case cannot be said to be a perverse finding warranting interference. Thus, this Court finds no ground to grant leave to appeal.

8. Petition is dismissed.

MUKTA GUPTA, J.

JANUARY 17, 2018
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