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

Date of decision: 16.01.2020

+ CRL.A. 131/2018

LEENA KATARIA

..... Appellant

Through Mr.Faisal Naseem, Adv. with
Mr.Vinay Garg, Adv.

versus

STATE & ANR

..... Respondents

Through

Mr.Abhay Kumar, Adv. with
Mr.Rahul Ranjan, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. The present petition is filed under section 378(1) of Cr.P.C. seeking special leave to appeal against the impugned order dated 10.01.2017 passed by learned MM (N.I. Act)-04, South East District, Saket Courts, New Delhi in the criminal complaint No.614484/16.
2. The facts of case as stated in the present petition are that respondent no.2 approached petitioner for a friendly loan of ₹3,15,000/- (Rupees Three Lakh Fifteen Thousand Only) in April-July, 2012 and due to good relations with respondent no.2, petitioner gave loan to him with the assurance that he

shall return the said amount as early as possible. After much persuasion and request to respondent no.2 for clearance of outstanding amount of Rs. 3,15,000/-, respondent no.2 issued a cheque bearing No.208135 dated 05.01.2014 for a sum of Rs.2,95,000/- drawn on Punjab & Sind Bank, Kalkaji, New Delhi in favour of petitioner. However, on presentation of the cheque, it was dishonoured due to 'insufficiency of funds' which was informed to the petitioner vide cheque return memo report dated 21.01.2014. The petitioner by means of legal notice dated 04.02.2014 called upon respondent no.2 to make payment of the cheque amount within 15 days from the date of receipt of notice. Since there was no response from respondent no.2, petitioner instituted a complaint under Section 138 of the Negotiable Instruments Act, 1881 before the court of Ld. MM with a prayer to summon, try and punish him for the offence committed. Thereafter, notice under Section 251 Cr.P.C. was framed against respondent no.2. The respondent no, who filed an application under Section 145(2) NI Act which was allowed by the Ld. MM on 21.09.2015.

3. Further case of petitioner is that she examined herself as CW-1 by way of affidavit and also cross examined and discharged. After the evidence of petitioner, respondent no.2 was examined under Section 313 Cr.P.C.

wherein all the incriminating evidences were put to him and he denied the same. Consequently, respondent no.2 examined himself as DW-1 and he was cross examined and discharged. Respondent no.2 in order to rebut the presumption had relied upon a cheque book allegedly bearing the receiving from the petitioner and legal notice dated 04.10.2013 without any proof of service. Thereafter, the learned MM vide impugned judgment dated 10.01.2017 acquitted respondent no.2 for the offence under section 138 of the N.I. Act.

4. The present petition is filed on the ground that impugned order dated 10.01.2017 is ex facie contrary to the law and perverse and is wholly unjust and the same is liable to be set aside. Learned MM has erred by ignoring the statement of respondent no.2 recorded under Section 313 Cr.P.C. wherein he has clearly admitted that loan was taken from the petitioner amounting to Rs. 3,15,000/- during the period of April to July 2012 and has further admitted to have issued the cheque in question in favour of petitioner. Moreover, Ld. MM has also overlooked the notice framed under Section 251 Cr.P.C. against respondent no.2 wherein he has admitted to have taken a loan from the petitioner though he alleged to have taken loan of

Rs.1,50,000/- and set up the defence of issuing the cheque in question as security for the loan.

5. Learned counsel for the petitioner submits that learned MM has failed to appreciate the law that defence of security necessarily stipulates that repayment has been made by the borrower but in the present case respondent no.2 has miserably failed to prove repayment of loan amount to the petitioner. The court below has erred in law in believing testimony as well as the documents produced by respondent no.2 as a gospel truth without requiring him to prove the same in contravention of the law of evidence. It is further submitted that decision of Ld. MM is solely on the basis of two documents produced by respondent no.2 which are one; a cheque book which is Exhibit DWI/B alleged to be bearing signatures of the petitioner and the other; legal notice which is Exhibit DWI/C allegedly sent by respondent no.2 to the petitioner. However, respondent no.2 has miserably failed to prove both these documents on record. Thus, the impugned order deserves to be set aside.

6. On perusal of the impugned order dated 10.01.2017, it is revealed that the case of complainant/petitioner is that she had advanced loan of Rs.3,15,000/- to accused/respondent no.2 but the same has not been

supported by any document to prove that the loan was actually advanced. The petitioner in her examination as CW-1 had specifically stated that she can produce the bank statement to show withdrawal of money from her account, however, she did not produce any document. To support her claim, further, the petitioner has stated that loan was given in three partly payments from the month of April to July 2012 in cash. However, no specific date has been mentioned in the complaint regarding payments were made to accused/respondent no.2. The petitioner also denied service of legal notice Ex.DW1/C sent by respondent no.2 to her demanding his blank cheques. However, petitioner contended before the Ld. Trial Court that notice Ex. DW1/C was not sent to her on her address. The same was denied by respondent no.2 in his cross-examination and he specially stated that the legal notice was sent on the address of maternal house of the petitioner. The petitioner did not prove that she has severed from her parents but after marriage the address was not of her parents. The legal notice Ex. DW1/C is accompanied with postal receipt Ex. DW1/D, therefore, on the basis of the presumptions u/s 27 General Clauses Act and 114(F) of the Indian Evidence Act, 1872 Ld. Magistrate opined that legal notice was delivered to the petitioner. Petitioner has also tried to bring contradiction on record in the

testimony of respondent no.2 and legal notice Ex. DWI/C wherein in para no.2 it is stated that respondent no.2 had taken friendly loan of Rs. 1,50,000/- which is contrary to the deposition of respondent no.2 as DW-1 where he has deposed that he was a guarantor for loan advanced of Rs.50,000/- and Rs. 1,00,000/- to two different persons. Based upon the aforesaid facts, the learned Trial Court opined that it is not a material contradiction as the loan admitted by respondent no.2 is Rs. 1,50,000/- for whichever purpose he might have taken the same. It is of no material consequence that whether the loan of Rs. 1,50,000/- was taken by respondent no.2 himself or a guarantor as on both the occasions, he has admitted and has been constant on the point of amount of loan of Rs. 1,50,000/-.

7. The contention of the petitioner before Ld. the Trial Court was that entry at point "A" and "B" and her signatures in passbook Ex. DWI/B are forged, false and fabricated. However, the burden was upon the petitioner to take the argument to its logical end. No steps were taken by petitioner to get the document examined by Forensic Expert. Further, on comparing through naked eye, the disputed signature at point "A" & "B" on Ex. DWI/B and the signatures of the petitioner on her testimony dated 10.03.2016 appeared to

be similar. Accordingly, the Ld. Trial Court opined that the bare denial of signatures will not come to the rescue of petitioner.

8. It is not in dispute that loan was given in the year 2012. The petitioner has also stated in her complaint Ex.CW1/6 in para 5 that *“the accused had issued two other cheques out of which cheque for Rs.5,000/- was honoured on 08.08.2012 and another of Rs.15,000/- was dishonoured on 28.12.2012”*. She has also stated in her cross-examination as CW-1 that *“I had received total three cheques from the accused. The first cheque was cleared on 08.08.2012 and second cheque was dishonored vide memo dt. 28.12.2012 and the third cheque was dishonored vide memo dt. 21.01.2014”*.

9. The Ld. Trial Court observed that petitioner has also failed to give particular dates on which the cheques were issued by respondent no.2 in favour of the petitioner. Further, petitioner has not given any satisfactory reason as to why she did not send any written communication demanding the balance payment from respondent no.2. This fact becomes all the more important in the light of the testimony of respondent no.2 as DW-1 and legal notice Ex.DW1/C sent to the petitioner in October 2013 demanding his security cheques from the petitioner. Accordingly, learned Trial Court

opined that the case of the petitioner that there exists legally enforceable debt of Rs.3,15,000/- against respondent no.2, is rendered doubtful. Based upon that, the learned Trial Court dismissed the case of the petitioner and acquitted respondent no.2 for the offence punishable under section 138 of the N.I. Act.

10. It is a settled principle of law that the presumptions U/s 118 (a) and 139 of N.I. Act, 1881 are rebuttable in nature and standard of proof required by accused such rebuttal is preponderance of probabilities and the standard of proof on behalf of prosecution is proof of guilt beyond all reasonable doubts. In the case of ***K. Prakashan Vs. P. K. Surenderan: (2008) 1 see 258*** wherein it is observed that:-

"Para 13. 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 aid 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."

Para 14. 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".

Para 16. The nature and extent of such presumption came up for consideration before this Court in M.S. Narayana Menon Vs. State of Kerala wherein it was held :(SCC p. 50, para 30)

"30. Applying the said definitions of "proved" or "disproved" to the principle behind. Section 118 (a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon".

Para 17. This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefore can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon".

11. Accordingly, following the law laid down in the above mentioned judgments and also the law of preponderance of probability which runs common through the judgments relied upon by the accused/respondent titled as ***Vijay vs. Laxman & Anr: 1 (2003) BC 743 (SC); Shobha vs. Gajanan: 1 (2003) BC 101 of Hon'ble Bombay High Court; Ashok Leyland Finance***

Ltd vs. State of Rajasthan &Anr.: 1 (2013) BC 433 of Hon'ble Rajasthan High Court; Kanahiya Ghamandi Lai vs. Subhash: 1 (2013) BC 391 of Hon'ble Rajasthan High Court; and Sanjay Mishra vs. Ms. Kanishka Kapoor: AIR 2009 (NOC) 2327 (Bom)=2009 (4) AIR Bom R 436, the respondent has been successful in rebutting the presumptions in favour of the petitioner. Now, when accused/respondent has been successful in rebutting the presumptions U/s 118 (a) and 139 of N.I. Act, the burden shifts upon the petitioner to prove her case beyond reasonable doubts.

12. However, In view of facts and circumstances narrated above, the petitioner/complainant has miserably failed to prove her case beyond reasonable doubt.

13. Finding no merit in the present petition, the same is, accordingly, dismissed.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 16, 2020
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