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

% *Reserved on: September 13, 2023*
Date of Decision: December 19, 2023

+ **CRL. A. 786/2023**

JAL SINGH MALIK

..... Petitioner

**Through: Mr. Sajan K. Singh and Ms.
Sangeeta Singh, Advocates**

V

OM PRAKASH

....Respondent

**Through: Mr. Prashant Sharma and
Mr. Ravi Kant Gautam,
Advocates**

CORAM

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

JUDGMENT

1. The present Appeal bearing no.786/2023 is filed under section 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “**the Code**”) read with section 482 of the Code to challenge judgment 02.04.2019 passed by Ms. Prabh Deep Kaur, Metropolitan Magistrate-02, South, Saket Courts, Delhi (hereinafter referred to as the “**trial**”



court”) bearing CC no. 471383/2016 titled as **Jal Singh Malik V Om Prakash.**

2. The appellant/complainant Jai Singh Malik (hereinafter referred to as “**the appellant**”) through attorney Mala Devi Malik filed a complaint under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as “**the Act**”) against the namely Om Prakash/accused (hereinafter referred to as the “**respondent**”) on allegations that the respondent issued a cheque bearing no. 098957 dated 10.01.2016 amounting to Rs. 6,00,000/- drawn on State Bank of India, Ambedkar Nagar, Delhi–110017 (hereinafter referred to as “**the cheque in question**”) in favour of the appellant towards discharge of liability and the said cheque got dishonoured when presented for encashment on the ground of “**funds insufficient**” vide return memo dated 15.03.2016. The appellant pleaded that the appellant, a member of paramilitary force, was advised by the respondent who is also relative of the appellant to purchase a flat in Delhi. The appellant has agreed to purchase a flat in locality of Krishna Park/Jawahar Park. The appellant had deposited Rs.4,47,095/- in two accounts bearing no 160010100050643 and 10207358344 maintained at Axis Bank and



State Bank Of India during period from 07.02.2008 to 2012 and gave Rs. 1,52,905 in cash in the year 2013 to 2014 total Rs.6,00,000/- to the respondent on assurance of the respondent regarding purchase flat for the appellant.

2.1 The respondent avoided to purchase a flat for the appellant or to return the amount already paid to the respondent. The respondent due to intervention of the relatives had agreed to pay back Rs.6,00,000/- to the appellant in the month of December 2015 and accordingly issued a post-dated cheque i.e. cheque in question in favour of the appellant to liquidate the admitted legal liability with assurance that cheque in question would be encashed. The appellant presented cheque in question for encashment to its banker i.e. State Bank Of India, Branch Sangam Vihar on 11.03.2016 but the said cheque was not honoured and returned back unpaid vide cheque return memo dated 15.03.2016 with remarks "funds insufficient". The respondent did not paid the cheque amount despite notice dated 16.03.2016 within stipulated period. Hence the complainant filed present complaint.

2.2 The court of Ms. Preeti Parewa, Metropolitan Magistrate-02, NI Act. Saket vide order dated 23.04.2016 observed that there are



sufficient ground for proceedings against the respondent and accordingly issued the summons to the respondent. The respondent vide order dated 06.08.2016 was given notice under section 251 of the Code for offences punishable under section 138 of the Act to which the respondent pleaded not guilty and claimed trial. The respondent filed an application under section 145(2) of the Act which was allowed vide order 06.08.2016 passed by the court of Ms. Preeti Parewa, Metropolitan Magistrate-02, NI Act, Saket by observing that the respondent is having valid defence. The attorney of the appellant and the appellant were examined and cross examined as CW1 and CW2 respectively. The evidence of the appellant was ordered to be closed vide order dated 08.03.2018.

2.3 The statement of the respondent was recorded under section 313 read with section 281 of the Code wherein the respondent stated that he had given Rs. 50,000/- to the appellant in the year 2007. The appellant returned back Rs. 49,000/- back to the respondent on 07.02.2008 with assurance to pay balance amount of Rs.1,000/- later on. The appellant approached the respondent in December, 2008 for taking Rs.3,50,000/- for purchasing a property and the respondent



gave Rs.3,50,000/- to appellant who assured to return said amount soon. The appellant repaid Rs. 3,50,000/- in span of 04 years and the appellant returned said amount till year 2012. The respondent involved other relatives as the appellant was making payment in installment and the appellant assured that he would remain careful in future. The appellant approached the respondent in year 2015 for purchasing a property jointly and offered that he would pay Rs.6 lacs while the respondent should pay Rs. 10 lacs. The appellant asked for a security cheque of Rs. 06 lacs and assured the respondent to pay Rs. 6 lacs in cash. The appellant assured the respondent to pay Rs. 3 lacs by December, 2015 and balance amount of Rs. 3 lacs in first week of January. The appellant did not pay any amount and misused the cheque. The appellant received legal notice. The respondent preferred to lead defence evidence. The respondent examined Manju Singhal as DW1 and himself as DW2. The defence evidence on behalf of the respondent was ordered to be closed vide order dated 06.03.2019. The trial court vide impugn judgment acquitted the respondent for offence punishable under section 138 of the Act.



3. The appellant being aggrieved filed present appeal. The appellant was granted leave to appeal vide order dated 13.09.2023. The appellant challenged impugned judgment on grounds that the trial court failed to appreciate that the presumption as per the Act is always drawn in the favour of the holder of the instrument i.e. the payee. The respondent has admitted signature on the instrument and other particulars were filed by him. The trial court erred in holding that the appellant has changed his version as minor discrepancies in the oral testimony of the Appellant are not sufficient to disbelieve his testimony which cannot be discarded being hearsay. The impugned order suffers from perversity as the trial court has failed to appreciate that liability toward the cheque in question was to be disproved by the drawer of the cheque i.e. the respondent as the presumption draws always in the favour of the payee. The trial court has fastened entire liability of proving upon the appellant. The trial court did not appreciate that the appellant has paid major part of amount of Rs. 6,00,000/- by depositing in account of the respondent which remained un-rebutted and stood affirmed and gave Rs. 1,52,905/- in



cash. The respondent relied on document Ex. CW2/D1. The appellant prayed that the appeal be accepted.

4. The counsel for the appellant advanced oral arguments and also submitted written submissions. The counsel for the appellant argued that the respondent admitted issuance of cheque in question Ex. CW1/B and service of legal notice Ex. CW1/D. The entire testimony of the appellant as CW2 cannot be disbelieved due to minor discrepancies in his testimony as the appellant had deposited major part of amount directly in bank accounts of the respondent as proved from Bank Deposit Receipt Ex. CW1/J. The respondent could not establish his defence as per law i.e. the cheque in question Ex. CW1/B was not issued towards discharge of liability. The counsel for the appellant in respect of document Ex. CW2/D1 argued that document Ex. CW2/D1 was put to the appellant in cross examination by the respondent as such said document can be read against the respondent. The trial court erred in holding that document Ex. CW2/D1 is incomplete and does not imply that the appellant had paid to the respondent and wrongly held that it appeared that the appellant and the respondent are co-buyers and the respondent is assuring to buy the



share of the respondent and there is no admission of any liability by the respondent. However, the respondent has acknowledged his liability towards the Appellant. The counsel for the appellant relied on **Rangappa V Sri Mohan**, 2010(5) SCALE 340 and **Uttam Ram V Devinder Singh**, 2019(4) SCALE 136. The counsel for the appellant argued that the appeal be accepted and impugned judgment be set aside.

4.1 The counsel for the respondent during argument defended the impugned judgment and argued that the respondent has raised probable defence as per section 145(2) of the Act and the appellant could not prove basic ingredients of section 138 of the Act. The case put forward by the appellant is improbable regarding giving of money to the respondent in installments for purchase of property from the year 2006 to 2014. The counsel for the respondent also referred cross examination of CW1 and CW2. The document Ex.CW2/D1 although admitted by the respondent is a vague and ambiguous document which was never acted upon. The appeal is liable to be dismissed.

5. The perusal of impugned judgment reflects that the trial court has discussed legal provisions and observed that the court is under an



obligation to raise the presumption contemplated under sections 118 and 139 of the Act and the accused is required to raise a probable defence to rebut such a presumption by leading evidence or bringing such facts on record in the cross examination of the complainant that could make the latter's case improbable. It is not necessary for the accused to disprove the existence of consideration by way of direct evidence. The standard of proof has been held to be preponderance of probabilities & the inference of preponderance of probabilities can be drawn not only from the material that has been placed on record but also by reference to the circumstances upon which the accused relies. It was further observed that if the accused is proved to have discharged the initial onus of proof placed on him by showing that the existence of consideration was improbable or doubtful or illegal, then the onus will shift back to the complainant who will then be under an obligation to prove it as matter of fact and failure to do so will disentitle him to any relief on the basis of the negotiable instrument and this obligation can be also discharged by way of cross examination of the complainant.



5.1 The trial court after referring cross examination of CW1 who was attorney of the appellant observed that CW1 was not aware of the material facts of the transactions in question as she admitted that she did not have personal knowledge of all the facts and circumstances of the transactions in question and accordingly opined that the testimony of CW1 is of no use to the appellant to prove his case. The trial court after referring testimony of the appellant as CW2 observed that the appellant had paid Rs.1,52,905/- to the respondent in cash but the appellant has kept changing his version as to when the cash payment was made whether till the year 2012 only or in between the year 2013 to 2014 and further observed that in absence of a particular account statement then liability of the appellant to pay the cheque amount cannot be determined. The trial court also observed that it is highly improbable that a person who has given cash payment to the respondent on regular basis in installments would be able to recollect or remember the accurate details of payments on day to day basis without keeping the written record and the appellant who wants to buy a property worth Rs.20 lacs would keep paying money in installments from the year 2006 till 2014 and would pay only Rs. 06 lacs in eight



years for purchasing the property without the actual purchase of the property. The trial court pertaining to document Ex.CW2/D1 observed that document Ex.CW2/D1 is incomplete and does not imply that the appellant has made the payment of Rs. 06 lacs to the respondent and return of which was assured by the respondent rather it was reflecting from the document Ex.CW2/D1 as if the appellant and the respondent are co-buyers and accused is assuring to buy the share of the appellant and the respondent is assuring the appellant to make the payment of share of the appellant. It was observed by the trial court that Ex.CW2/D1 does not give any help to the appellant as there is no admission of any liability by the respondent. The document Ex.CW2/D1 corroborated the plea of the respondent that he issued the cheque as security.

5.2 The trial court ultimately dismissed the complaint and acquitted the respondent by observing that the presumptions in favour of the appellant under section 118 and 139 of the Act have been rebutted by the respondent by preponderance of probabilities whereas the appellant has failed to prove its case beyond all reasonable doubt.



6. Section 138 of the Act creates criminal liability on a person who issues a cheque towards discharge of a debt or any other liability as a whole or in part and the cheque is dishonoured by the bank on presentation. Section 139 of the Act provides presumption in favour of holder that he received the cheque for the discharge, in whole or in part, of any debt or other liability. Section 145(2) of the Act the Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

7. The respondent admitted issuance of cheque in question Ex.CW1/B and receipt of legal notice Ex. CW1/D. It is also proved that cheque in question Ex. CW1/B was dishonoured due to “funds insufficient” vide cheque return memo Ex. CW1/C. Issue which needs consideration is that whether cheque in question Ex. CW1/B was issued in discharge of legally enforceable liability and whether the respondent is able to probable defence sufficient to rebut in presumption in favour of the appellant.

8. The appellant pleaded and deposed in affidavit Ex.CW2/X that the respondent instigated the appellant to purchase a property/flat and



accordingly the respondent deposited Rs.4,47,095 during period from 07.02.2008 till 2012 in two accounts of the respondent as reflected from 32 receipts Ex. CW1/J besides payment of Rs.1,52,905 in cash during period 2013-2014 to the respondent. However the respondent did not purchase the flat for the appellant. Thereafter the respondent due to intervention of relatives issued post-dated cheque in December, 2015 i.e. the cheque in question Ex. CW1/B which on presentation got dishonoured on ground of “funds insufficient” vide cheque returned memo Ex. CW1/C. The respondent did not pay cheque amount despite service of notice Ex. CW1/D. The appellant as CW2 in cross examination deposed that he had paid Rs. 6 lacs in cash and by deposition during period 2008 to 2012. The appellant admitted that he did not have any written document regarding cash payment of Rs.1,52,905 to the respondent. The cheque in question was given to him in December, 2015 by the respondent in lieu of the payment made by him. The appellant as CW2 in cross examination was confronted with document dated 11.12.2015 Ex. CW2/D1 and deposed that said document was executed at time of issuance of cheque as acknowledgement. The appellant denied suggestions that the



respondent issued cheque in question Ex. CW1/B in pursuance of Ex. CW2/D1 and not towards any legal liability or that the appellant failed to comply with agreement Ex. CW2/D1 and as such the respondent does not have any liability to pay cheque amount to the appellant.

8.1 The respondent in his defence in statement under section 313 of the Code read with section 281 of the Code stated that the appellant in year 2015 approached the respondent for purchase of the property and has agreed to contribute Rs.6 lacs. The respondent issued the cheque in question Ex. CW1/B as security cheque which was misused by the respondent. DW1 Manju Singhal deposed that the respondent deposited Rs.4,47,095/- in account of the respondent for household purpose of the wife of the appellant i.e. CW1. The appellant and CW1 never gave any money to the respondent. The appellant misused the cheque Ex. CW1/B which was given as security. The appellant and CW1 has agreed to return Rs.6 lacs in two installments of Rs.3 lacs each but did not pay installments. DW1 in cross examination admitted signature of the respondent on document Ex. CW2/D1 and reasserted that cheque in question Ex. CW1/B was given as security cheque. DW1 further asserted that the appellant and the respondent agreed to



purchase property as per agreement and for which the respondent had agreed to contribute Rs.10 lacs and appellant had to contribute Rs. 6 lacs but the appellant did not give pay said amount. The appellant has taken the cheque in question Ex. CW1/B as security and subsequently misused the cheque in question Ex. CW1/B. DW1 in cross examination also deposed about previous transaction of money between the appellant.

8.1.1 The respondent as DW2 deposed that on earlier occasions had given Rs. 50,000/- and Rs. 3,50,000/- to the appellant. The appellant also deposited Rs. 4,47,095/- in his account for household expenses. The appellant in month of December, 2015 proposed to purchase a property jointly for which agreement Ex. CW2/D1 was executed. The appellant had agreed to pay Rs. 6 lacs in installments to be paid in December 2015 and January 2016 by depositing in account of the respondent and took cheque in question as security cheque. However the appellant did not pay Rs. 6 lacs and misused cheque in question Ex. CW1/B given as security cheque. The respondent as DW2 in cross examination admitted that cheque in question Ex. CW1/B was filled and signed by him and he also received notice Ex. CW1/D. The



respondent admitted that Ex. CW1/D1 was signed by him after reading it. The respondent as DW1 also admitted that the appellant had deposited some amount in his account for purchase of property and Rs. 4,47,095/- towards household expenses of CW1.

9. It is reflecting from quality and quantity of evidence proved on record that the respondent issued cheque in question Ex. CW1/B in favour of the appellant. The cheque in question Ex. CW1/B was got dishonoured on ground of “funds insufficient” vide memo Ex. CW1/C and cheque amount was not paid by the respondent despite service of notice Ex. CW1/D. It is also established that the appellant deposited 4,47,095/- in two accounts of the respondent vide 32 receipts Ex. CW1/J. The respondent in cross examination also admitted that the appellant deposited certain amount in accounts of the respondent for the purchase of the property. The plea of the respondent that the appellant had deposited Rs. 4,47,095/- in the account of the respondent for household expenses of CW1 who is wife of the appellant does not inspire confidence and appears to be highly improbable once the respondent admitted payment of certain amount by the appellant for the purchase of the property.



9.1 The respondent also took defence that the appellant and the respondent month of December, 2015 agreed to purchase a property and for that the respondent had agreed to contribute Rs. 10 lacs and the appellant had agreed to contribute Rs. 6 lacs. The appellant had agreed to pay Rs. 6 lacs in two installments of Rs. 3 lacs each and out of which first installment was to be paid in December, 2015 and another was to be paid in month of January, 2016 and at that time, the respondent cheque in question Ex. CW1/B as security cheque. The appellant did not pay Rs. 6 lacs in installment as agreed and misused the cheque. The defence as taken by the respondent is appearing to be highly probable. It is not understandable that why the respondent issued the cheque in question Ex. CW1/B in favour of the appellant in December, 2015 even as security cheque once amount of Rs. 6 lacs was not paid by the appellant as his share for purchase of the property. The defence of the respondent does not inspire any confidence appears to be sham and without any basis. The respondent was needed to understand that instrument like cheque should not be issued in such casual manner as once cheque is issued it carries serious legal consequences. The respondent in agreement/document Ex. CW2/D1



admitted its execution as well his signature. The document Ex. CW2/D1 was put to the appellant during his cross examination as CW2 by the respondent himself. The perusal of Ex. CW2/D1 reflects that the appellant had contributed Rs. 6 lacs for purchase of property as detailed in document/agreement Ex. CW2/D1 and the respondent had agreed to pay back Rs. 6 lacs to the appellant by issuance of cheque in favour of the appellant. The appellant proved deposition of Rs. 4,47,095/- in two accounts of the respondent from 32 receipts Ex. CW1/J and also deposed payment of Rs. 1,52,905 in cash in the year 2013 to 2014 total amounting to Rs.6,00,000/- to the respondent. The document Ex. CW2/D1 again corroborated plea of the appellant that the respondent issued cheque in question Ex. CW1/B in favour of the appellant. The respondent could not raise probable defence as section 145(2) of the Act to rebut presumptions in favour of the appellant as per sections 118 and 139 of the Act pertaining to the cheque in question Ex. CW1/B. The respondent also preferred not to reply notice Ex. CW1/D to raise his defence at first instance which also render defence of the respondent as afterthought.



9.2 The counsel for the appellant rightly argued that the trial court entire shifts burden on the appellant even the respondent admitted issuance of cheque in question Ex. CW1/B and receipt of notice Ex. CW1/D and entire testimony of the appellant as CW2 cannot be disbelieved due to minor discrepancies in his testimony particularly when the appellant had deposited major part of amount directly in bank accounts of the respondent as proved from 32 Bank Deposit Receipt Ex. CW1/J and the trial court erred in holding that document Ex. CW2/D1 is incomplete and by not reading in favour of the appellant also. The respondent issued cheque Ex. CW1/B in discharge of legal debt.

9.3 The counsel for the respondent argued without any legal and factual force that the respondent has raised probable defence as per section 145(2) of the Act and plea of the appellant is improbable regarding giving of money to the respondent in installments for purchase of property from the year 2006 to 2014. The arguments advanced by the counsel for the respondent cannot be accepted.

10. The trial court passed the impugned judgment after taking into consideration minor and insignificant variations and contradictions in



cross examination of the appellant as CW2 regarding details of cash amount stated to be paid by the appellant to the respondent and also on basis of unfounded assumptions and presumptions as detailed in impugned judgment. The trial court shifted the entire burden on the appellant to prove issuance of cheque in question Ex. CW1/B for discharge of legally enforceable debt even the respondent admitted issuance of cheque in question Ex. CW1/B in favour of the respondent. The trial court also misread and misunderstood document Ex. CW2/D1 to the benefit of the respondent and did not consider defence of the respondent. The defence taken by the respondent in cross examination of CWs, statement under section 313 and by leading defence evidence does not inspire any confidence and cannot be accepted. The impugned judgment is not legally sustainable and is set aside. The respondent is accordingly convicted for offence punishable under section 138 of the Act. The appeal is accordingly allowed.

11. List for arguments on the quantum of sentence on 16.01.2024.

**DR. SUDHIR KUMAR JAIN
(JUDGE)**

DECEMBER 19, 2023/abk