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

Date of Decision: 30.01.2024

+ CRL.REV.P. 138/2024

FAYAZ ALAM

..... Petitioner

Through: Ms.Astha, Adv. (DHCLSC)

versus

THE STATE NCT OF DELHI AND ANR. Respondents

Through: Mr. Shoaib Haider, APP

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

CRL.M.A. 2849/2024 (Exemption)

1. Allowed, subject to all just exception.

CRL.REV.P. 138/2024 & CRL.M.(BAIL) 161/2024 & CRL.M.A. 2848/2024

2. This petition has been filed by the petitioner under section 401 read with 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.') challenging the order dated 20.09.2023 passed by the learned Additional Sessions Judge-02, Central-District, Tis Hazari Courts, Delhi in C.A. No.181/2022, titled as ***Fayaz Alam v. Binod Kumar Sharma***, dismissing the appeal filed by the petitioner herein.

3. By the said appeal, the petitioner herein had challenged the judgment dated 08.07.2022 passed by the learned Metropolitan Magistrate (Central), NI Act-04, Central District, Tis Hazari Court,



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Delhi in C.C. No. 522771/2016, titled **Mr. Binod Kumar Sharma v. Sh. Fayaz Alam**, convicting him of the offence under Section 138 of the Negotiable Instruments Act, 1881 (in short, 'NI Act'), and the order dated 02.08.2022 passed by the learned Metropolitan Magistrate in the said Complaint, sentencing him to undergo simple imprisonment of four months and pay a fine of Rs.1,70,000/- as compensation under Section 357(1) of Cr.P.C. within a period of 30 days to the complainant/respondent no.2, and in case of default of the same, to undergo further simple imprisonment for two months.

4. In short, the facts giving rise to the present petition are that the respondent no.2 had filed the above referred complaint under Section 138 of the NI Act, stating therein that the respondent had friendly relations with the petitioner herein. The petitioner had approached the respondent no.2 for friendly loan on different dates, whereupon a sum of Rs.40,000/- was given by the respondent no.2 to the petitioner on 10.05.2011; Rs.30,000/- on 15.06.2011; Rs.10,000/- on 23.10.2011; Rs.18,000/- on 02.02.2012 and Rs.60,000/- on 14.05.2012, totalling Rs.1,58,000/-. In part-discharge of his above liability, the petitioner issued a post dated cheque bearing no.176091 dated 10.01.2013 for a sum of Rs.1 lakh drawn on the Punjab National Bank, Kailash Nagar, Delhi in favour of the respondent. On its presentation, however, the cheque was returned dishonoured with remarks "*Fund Insufficient*", vide returning memo dated 11.01.2013. The respondent thereafter issued a legal notice dated 17.01.2013 to the petitioner. In spite of receiving the said notice, as the petitioner did not make the payment, the above complaint was filed.



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5. Vide order dated 13.08.2019, notice of the accusations under Section 251 of the Cr.P.C. was framed against the petitioner herein, to which he pleaded not guilty and claimed trial.

6. As noted hereinabove, by the judgment dated 08.07.2022, the petitioner has been convicted of the offence under Section 138 of the NI Act. The appeal there against, has been dismissed by the learned ASJ vide its judgment dated 20.09.2023.

7. The learned counsel for the petitioner submits that the respondent no.2 had given only a loan of Rs.70,000/- to the petitioner, which stood repaid. The petitioner had also given a cheque of Rs.1 lakh to the respondent no.2 as security, which he misused by presenting the same in spite of receiving the refund of the amount that he had lent to the petitioner. She submits that therefore, the complaint filed by the respondent no.2 should have been dismissed by the learned Trial Court. She submits that the respondent no.2 had failed to meet the test required to sustain a conviction against the petitioner, which is one of beyond any reasonable doubt. She submits that, in fact, advancing a loan of more than a sum of Rs.20,000/- is not permitted and the same is barred in terms of Section 266 (SS) of the Income Tax Act, 1961. She further submits that the petitioner, in his defence, had led evidence in form of two witnesses, namely Mr.Nasummuddin (DW-1) and Mr.Noor Alam (DW-2), however, the learned Trial Court has wrongly disregarded their statements, stating that there is some contradiction in the same.

8. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same.



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9. In the present case, the learned Trial Court, evaluating the evidence led before it, has observed as under:

“8. After analysis of the material on record it is undisputed position that the cheque in question i.e. Ex.CW1/1 was issued by accused and it bears his signature. Further, from the unrebutted testimony of CW1 qua presentation and dishonour of the cheque in question and unimpeached dishonour memo Ex.CW1/2, the factum of presentment of the cheque within its period of validity and the factum of its dishonour stands established. Further, perusal of the record reveals that accused denied having received any legal demand notice, however, he admitted that one of the addresses on the legal demand notice is of his village and belongs to him. CW-1 has filed on record postal receipts, Ex. CW1/4 (colly), which remained unimpeached. In view of the uncontroverted testimony of CW-1 regarding service and receiving of legal demand notice by the accused and unimpeached Ex. CW1/4 (colly), the service of the legal demand notice upon the accused stands established. Thus, it is manifest that the complainant has complied all the mandatory requirements of Section 138 and section 142 of NI Act. Since, in the present case complainant has successfully established that the cheque in dispute was issued by the accused and the same got dishonoured and thereafter accused despite the service of the statutory notice failed to make the payment, a presumption under Section 139 NI Act is drawn in favour of complainant to the effect that the cheque in dispute was issued by the accused for a legally enforceable debt.

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10.....The oral testimony of CW1 and the documentary evidence led remained unrebutted.



- ◆ Admittedly, accused approached complainant for a friendly loan with the reservation that he had taken a loan of Rs. 70,000/- from the complainant. The defence taken by the accused was that he was a member in a committee run by a person known to the complainant and when he was not in a position to pay last two installments of committee he had taken loan of Rs. 70,000/- from the complainant and in return, complainant had to pay those two installments of Rs. 10,000/- each of the committee and would receive full committee amount of Rs. 1 Lakh. In his examination under Section 313 Cr.P.C. read with Section 281 Cr.P.C., accused had stated that he had repaid an amount of Rs. 70,000/- to the complainant and despite taking committee of Rs. 1 Lakh by the complainant, he failed to return the cheque in question. However, perusal of record reveals that no reliable evidence either oral or documentary has been brought forth by the accused to support the case as set by him. No proof either regarding the committee being run by person known to the complainant or regarding taking of amount of Rs. 70,000/- only as loan from him and the repayment of the same has been adduced. Moreover, there are contradictions and discrepancies in the version of the accused on one hand and the testimonies of the defence witnesses i.e. DW-1 & DW-2 on the other. As per accused, committee was being run by some person known to the complainant, however, as per the depositions of DW-1 & DW-2, committee was being run by the complainant himself. DW-1 deposed in his examination-in-chief that Rs. 20,000/- is remaining to be paid by the accused to the complainant and accused is ready to pay the same while as per the accused nothing remains left to be paid on his part to the complainant. Thus, there are inconsistencies and discordance among the defence witness and accused. Further, it is pertinent to mention that accused has not got himself examined as a witness. All these facts



taken together cast a doubt in the story of the defence.

- ◆ *Accused had taken the stand that the cheque in question was given as security to the complainant and despite taking the committee of Rs. 1 Lakh by the complainant, he failed to return the cheque in question to him. However, no evidence either oral or documentary has been brought on record to show the efforts made by the accused either by filing any complaint before the concerned bank to invalidate the said cheque or before any other competent authority when complainant failed to hand over the cheque in question to him despite several requests.*
- ◆ *A meticulous perusal of the material on record reveals that the accused has not replied to the statutory notice under 138 of the Act rebutting the allegations made by the complainant. The very fact that the accused has failed to reply to the legal demand notice lead to the inference that there was merit in the complainant's version. (Rangapa vs. Sri Mohan, AIR 2010 SC 1898).*
- ◆ *Evidence adduced on behalf of the complainant remained un rebutted. On the other hand, apart from the mere ipse dixit version of the accused no concrete and cogent evidence has been brought forth. Thus bare statement of the accused without any proof cuts no ice."*

10. The learned Appellate Court has also considered the evidence in detail and has observed as under:

"15. The plea of the appellant that legal notice was not served upon him and Ld. Trial Court has wrongly concluded the service of legal notice is humbly rejected as not only the address of appellant on the legal notice and the postal receipts are same but the appellant has admitted while recording his statement U/s 313 Cr.P.C. that the address of Bihar belongs to him but claimed that he is residing in Delhi for the last 20 years. However, no evidence to



prove the said contention of residence in Delhi for last 20 years is brought before the Ld. Trial Court. The appellant has chosen not to step into the witness box as defence witness in terms of Section 315 Cr.P.C. and produce record to show his residence in Delhi for past 20 years. Even while recording his statement U/s 294 Cr.P.C., appellant admitted the issuance of the cheque and filling of the details which implies that he himself has issued cheque towards part payment of his liability. The plea that he had taken only Rs. 70,000/- loan from the respondent falls flat in view of his admission of filling the cheque in question.

16. Ld. Trial Court has rightly observed that despite taking plea of being member of the Committee run by complainant/respondent, no evidence of such committee was produced by the appellant. Ld. Counsel for the appellant also failed to explain the contradictions and inconsistencies in the stand of appellant viz a viz testimony of DW-1 & DW-2 with respect to outstanding liability of the appellant.

17. The appellant is claiming that the cheque was given as security but despite service of legal notice to his village address where admittedly his father is residing who must have informed him about the receipt of such legal notice, no action was taken by the appellant either by replying to the legal notice or taking appropriate legal action by filing police complaint etc. for alleged misuse of cheque.

18. Ld. Trial Court has rightly observed that appellant has failed to produce any evidence of payment of Rs. 70,000/- to the respondent by either producing a witness to such payment or by producing any bank record from where the amount was withdrawn or transferred to the respondent."



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11. In *State of Kerala v. Puttumana Illath Jathavedan Namboodiri*, (1999) 2 SCC 452, the Supreme Court has held as under:

“5. Having examined the impugned judgment of the High Court and bearing in mind the contentions raised by the learned counsel for the parties, we have no hesitation to come to the conclusion that in the case in hand, the High Court has exceeded its revisional jurisdiction. In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice....”

12. Tested on the above parameters, I find no infirmity in the finding of the Courts below. Both the Courts have given reasons for disbelieving the version of the petitioner, which cannot be faulted. The plea of the learned counsel for the petitioner are to make this Court re-appreciate the evidence and to determine a finding contrary to the concurrent findings of the learned Trial Court and the learned Appellate Court.

13. Accordingly, I find no merit in the present petition. The same is



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dismissed. The pending applications are also rendered infructuous.

14. There shall be no order as to costs.

NAVIN CHAWLA, J

JANUARY 30, 2024/Arya/ss

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