



2024:DHC:6910



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:09.09.2024

+ **CRL.REV.P. 120/2023 & CRL.M.A. 33466/2023**

AKASH JAIN THROUGH PARAKOR

..... Petitioner

versus

STATE OF NCT OF DELHI & ANR.

.... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Sangam Singh, Advocate (Through V.C.).

For the Respondent : Mr. Satinder Singh Bawa, APP for the State.
Mr. Rajeev Singh Chauhan, Advocate for R-2/Complainant.

**CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN**

JUDGMENT

1. The present petition is filed under Sections 397/401 read with Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') against the judgment dated 13.01.2023 (hereafter '**impugned order**') passed by the learned Additional Sessions Judge ('ASJ'), Karkardooma Courts, Delhi in CA No. 40/2022 titled *Akash Jain vs. State & Anr.*

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2. By impugned order, the learned ASJ dismissed the appeal filed by the petitioner against the judgment dated 11.01.2022 and order on sentence dated 30.03.2022, passed by the learned Chief Metropolitan Magistrate ('CMM'), Karkardooma Courts, Delhi whereby the petitioner was convicted under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act').

3. The subject complaint was filed under Section 138 NI Act at the behest of complainant/Respondent No. 2 alleging that she had advanced a loan for a sum of ₹5,00,000/- in cash to the petitioner, against a written agreement dated 15.08.2016 executed between the petitioner and Respondent No. 2. It is alleged that the loan amount was to be repaid in December, 2017. In terms of the written agreement, the petitioner had allegedly taken a loan of ₹5,00,000/- from Respondent No. 2 for the purpose of upgradation of his sweet shop namely 'Paras Sweets.'

4. It is alleged that on demand, the petitioner issued a cheque for a sum of ₹5,00,000/- in favour of Respondent No. 2. It is alleged that the cheque in question was signed by the petitioner, however, the details in the said cheque, were filled by Respondent No. 2. It is alleged that thereafter, upon presentation, the said cheque was returned unpaid by the banker of Respondent No. 2 with the remark "funds insufficient" vide return memo dated 18.12.2017.

5. It is alleged that the petitioner failed to make the payment of the cheque amount despite receiving the legal notice dated 23.12.2017,

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stated to have been dispatched by Respondent No. 2 to the petitioner through courier as well as speed post.

6. The learned CMM *vide* order dated 11.01.2022 convicted the petitioner for an offence under Section 138 of the NI Act. The learned CMM observed that the petitioner had admitted his signatures on the cheque, and thus there arose a rebuttable presumption in favour of Respondent No.2. It was further observed that the petitioner could have simply rebutted the presumptions against him not just through cross-examination of Respondent No. 2 but also by relying upon the material produced by Respondent No. 2. It was noted that the petitioner had merely relied upon the admissions of Respondent No. 2 that she was earning a sum of ₹10,000/- to ₹15,000/- per month from tuition in the year 2016-17, and that her annual income was around ₹3-4 lakhs and above, however, the said testimony of Respondent No. 2 remained uncontroverted, and that the petitioner failed to make any suggestion to indicate that the complainant did not have the financial capacity to advance the said loan.

7. The learned CMM also noted that the petitioner except for his bald assertions, had failed to lead any evidence to show that his car was forcibly taken away, and the cheques in the car were misused. It was also observed that merely because Respondent No. 2 had failed to show the loan in her ITR of the relevant year, by itself, cannot defeat the case of the complainant. Consequently, the petitioner was convicted under Section 138 of the NI Act, and *vide* order dated

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30.03.2022, was sentenced to undergo simple imprisonment for a period of one year, and to pay a compensation of ₹6,75,000/- to Respondent No. 2 in equal monthly instalment of ₹5,000/- each. In default of payment of compensation, petitioner was sentenced to undergo simple imprisonment for a further period of 6 months.

8. The learned ASJ, by impugned order, dismissed the petitioner's appeal while specifically noting that the petitioner had been granted sufficient opportunity to cross examine Respondent No. 2, and lead evidence in defence. It was noted that the petitioner had failed to discharge his burden to establish that Respondent No. 2 did not possess the financial capacity to advance the loan in question. Consequently, the learned ASJ declined further opportunity to the petitioner to cross-examine Respondent No. 2, and dismissed the appellant's appeal against the order of conviction, and order on sentence passed by the learned CMM.

9. Aggrieved by the impugned order, the petitioner filed the present petition.

10. The learned counsel for the petitioner submitted that the learned Trial Court failed to consider that no account transfer was made by Respondent No. 2 in the account of the petitioner. He further submitted that Respondent No. 2 also did not make any withdrawal on or before 15.08.2016 from her account, the date on which the loan was allegedly advanced to the petitioner.



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11. He submitted that the learned Trial Court did not appreciate the fact that the agreement which was allegedly executed between both the parties on 15.08.2016 was not proved by any of the attesting witnesses.

12. He submitted that the learned Appellate Court failed to consider that Respondent No. 2, in her testimony, deposed that she gave private tuitions, and earned ₹15,000/- per month, however, she herself failed to prove the same as there was no independent witness who deposed in her favour. He submitted that Respondent No. 2 did not possess the financial capacity to advance the loan, and the learned Appellate Court erred in not granting any opportunity to the petitioner to defend his case as *vide* order dated 09.09.2021, the defence evidence was closed.

13. He submitted that there was no transaction of any kind between Respondent No. 2, and the petitioner, and submitted that the petitioner's cheque book was stolen either by Respondent No. 2 or her husband from the Maruti Car registered in the name of the petitioner's brother, when the car was forcibly taken away by Respondent No. 2's husband.

14. *Per contra*, the learned counsel for the respondents submitted that the learned Appellate Court has rightly upheld the conviction of the petitioner under Section 138 of the NI Act. He submitted that the petitioner had failed to rebut the presumption against him under Sections 139 read with Section 118(a) of the NI Act.



Conclusion

15. Since the present revision petition has been filed under Section 397 of the CrPC, challenging the concurrent findings of both lower courts, this Court's role is limited to assessing the correctness, legality, and propriety of the impugned judgment.

16. It is trite law that this Court is required to exercise restraint and should not interfere with the findings in the impugned orders or reappraise evidence merely because another view is possible unless the impugned orders are wholly unreasonable or untenable in law (Ref. ***Sanjaysinh Ramrao Chavan v. Dattaray Gulabrao Phalke: (2015) 3 SCC 123***). It is not open to the Court to misconstrue the revisional proceedings as a second appeal by sitting in appeal over the challenged orders. The Hon'ble Court in the case of ***State of Kerala v. Puttumana Illath Jathavedan Namboodiri : (1999) 2 SCC 452*** discussed the scope of revisional jurisdiction and held as under:

“5. 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 reappraise 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....”

(emphasis supplied)

17. In the present case, the petitioner has sought to prove his case by controverting that the cheque in question was not issued in discharge of any legally enforceable debt. It has been contended that the said signed cheque was stolen from the car of the petitioner by Respondent No. 2's husband, and that the said cheques were misused. It was argued that Respondent No. 2, as per deposition, gave private tuitions, and earned only ₹15,000/- per month. It was argued that Respondent No. 2 did not have the financial capacity to advance the said loan.

18. It is seen that no complaint of car being taken forcibly was made by the petitioner.

19. At the outset, it is relevant to note that the signature of the petitioner on the cheques in dispute have not been denied. It is trite law that once the execution of the cheque is admitted, the presumption under Section 118 of the NI Act that the cheque in question was drawn for consideration and the presumption under Section 139 of the NI Act that the holder of the cheque/ respondent received the cheque in discharge of a legally enforceable debt or liability are raised against the accused [Ref. ***Rangappa v. Sri Mohan* : (2010) 11 SCC 441**].



20. The Hon'ble Apex Court in ***Rajesh Jain v. Ajay Singh : (2023) 10 SCC 148***, while discussing the appropriate approach in dealing with presumption under Section 139 of the NI Act, observed the following :

54. Once the presumption under Section 139 was given effect to, the courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the court can straightaway proceed to convict him, subject to satisfaction of the other ingredients of Section 138. If the court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the said fact independently, without taking aid of the presumption. The court would then take an overall view based on the evidence on record and decide accordingly.

55. At the stage when the courts concluded that the signature had been admitted, the court ought to have inquired into either of the two questions (depending on the method in which the accused has chosen to rebut the presumption) : Has the accused led any defence evidence to prove and conclusively establish that there existed no debt/liability at the time of issuance of cheque? In the absence of rebuttal evidence being led the inquiry would entail : Has the accused proved the non-existence of debt/liability by a preponderance of probabilities by referring to the "particular circumstances of the case"?

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57. Einstein had famously said:

“If I had an hour to solve a problem, I'd spend 55 minutes thinking about the problem and 5 minutes thinking about solutions.”

Exaggerated as it may sound, he is believed to have suggested that quality of the solution one generates is directly proportionate to one's ability to identify the problem. A well-defined problem often contains its own solution within it.

58. Drawing from Einstein's quote, if the issue had been properly framed after careful thought and application of judicial mind, and the onus correctly fixed, perhaps, the outcome at trial would have been very different and this litigation might not have travelled all the way up to this Court.

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61. The fundamental error in the approach lies in the fact that the High Court has questioned the want of evidence on the part of the complainant in order to support his allegation of having extended loan to the accused, when it ought to have instead concerned itself with the case set up by the accused and whether he had discharged his evidential burden by proving that there existed no debt/liability at the time of issuance of cheque.

(emphasis supplied)

21. On a perusal of the judgment on conviction dated 11.01.2022, and the impugned order, it is seen that the arguments of the petitioner have been extensively dealt with by the learned Trial Court and the learned Appellate Court respectively.



22. The learned Trial Court rightly noted that the petitioner had failed to rebut the presumptions insofar as he did not lead any evidence to corroborate that the blank cheques were forcibly taken from his possession or were misused.

23. The petitioner has also contested the financial capacity of Respondent No. 2 to advance the said loan by stating that Respondent No. 2 is a house wife, and gives private tuitions, and earns only ₹15,000/- per month. It has also been argued that Respondent No. 2 failed to even prove the same since there was no independent witness who deposed in her favour. In that regard, the learned Appellate Court placing reliance on the judgment of the Hon'ble Apex Court in ***Tedhi Singh v. Narayan Dass Mahant : (2022) 6 SCC 735*** noted that the petitioner had the initial burden to set up a defense in reply to the notice sent by Respondent No. 2 stating that Respondent No. 2 did not have the financial capacity to advance the loan.

24. The Hon'ble Apex Court in the case of ***Tedhi Singh v. Narayan Dass Mahant (supra)*** had observed as under:

“10. ... The proceedings under Section 138 of the NI Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent, the courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing



independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross-examination of the witnesses of the complainant. Ultimately, it becomes the duty of the courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.

(emphasis supplied)

25. The learned Appellate Court rightly noted that since the petitioner did not reply to the said notice when the cheque in question got dishonored, it was not the duty of Respondent No. 2 to show that she did not have the financial capacity to advance the loan in question. It was further observed that the petitioner was granted sufficient opportunity to cross examine Respondent No. 2, and lead evidence in defence. It was observed that during her cross examination, she was asked some questions related to her capacity to which she responded that she gave tuitions and earned ₹10,000/- to ₹15,000/- per month, and that her annual income was around ₹3-4 lakhs. The learned Appellate Court noted that thereafter the testimony of Respondent No. 2 remained uncontroverted, and no further question was asked to dispute her financial capacity.

26. It was observed that the husband of Respondent No. 2 was in the Delhi Police, and a perusal of her bank statements showed that the transactions in her bank account were in lakhs. Consequently, the learned Appellate Court noted that Respondent No. 2 did have the



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financial capacity to advance the said loan in question. In the absence of any evidence led by the petitioner, merely because the petitioner made a bald assertion regarding the financial capacity of Respondent No. 2, cannot be construed to contend that the petitioner had raised a probable defence.

27. It was also argued that the petitioner was not granted an opportunity to defend his case since *vide* order dated 09.09.2021, the defence evidence of the petitioner was closed. From a perusal of the judgment on conviction dated 11.01.2022 passed by the learned Trial Court, it transpires that the defence evidence was closed since the petitioner had failed to lead any evidence in his defence despite being granted multiple opportunities to do so.

28. In the instant case, upon a consideration of the totality of circumstances, it is evident that the petitioner had failed to rebut the presumptions under Sections 118 and 139 of the NI Act.

29. In view of the aforesaid discussion, this Court finds no infirmity in the impugned order, and the same does not merit any interference.

30. The present petition is dismissed in the aforesaid terms.

AMIT MAHAJAN, J

SEPTEMBER 9, 2024

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