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

\+ CRL.L.P. 118/2024, CRL.M.A. 6353/2024 and CRL.M.A. 6354/2024

RAJENDRA KUMAR TYAGI .....Petitioner

Through: Mr.Vikram Singh Bhatia, Mr.Ashwani Kumar Bhatia, Mr.Raman Bhatia, Ms.Prachi Chaudhary, Ms.Divya Bhutt & Ms.Upasna Dutt, Advocates

versus

SHAHNAWAZ KHAN .....Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

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

% **25.07.2024**

1. The present petition has been filed by the petitioner/complainant under Section 378 (4) Cr.P.C. seeking leave to assail the judgment of acquittal dated 21.10.2023 passed in CC NI ACT 871/2021 titled as "Rajendra Kumar Tyagi v Shahnawaj Khan" by the court of learned MM, NI Act, Digital Court, Shahdara District, Karkardooma Court, Delhi, whereby respondent/accused has been acquitted of the charges under Section 138 of the Negotiable Instruments Act, 1881.

2. Facts of the present case in a nutshell, are that the respondent , who was well known to the petitioner, had approached him for a friendly loan of Rs. 1,00,000/- in the month of August 2019. On 16.08.2019 the same was advanced by the petitioner to the respondent. The respondent on 16.12.2020, in discharge of the said liability had issued a cheque bearing no. 143075 of the same date drawn on Canara Bank, Yamuna Vihar Branch, Delhi. The said cheque was returned dishonoured vide return memo dated 20.02.2021

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with the remarks "dormant account". A legal notice calling upon the respondent for making payment was sent through speed post on 10.03.2021 which was duly served on the respondent on 11.03.2021, however the amount remained outstanding. Hence the filing of the criminal complaint.

3. The learned court below, after examining the evidence adduced by the respective parties has come to the conclusion that the respondent/accused had successfully managed to rebut the presumption raised against him by showing material inconsistencies in the case of the petitioner/complainant, thereby proving that the said cheque was not given in discharge of the legal debt. Aggrieved by the aforesaid order dated 21.10.2023, the petitioner/complainant has filed the present petition seeking leave to appeal.

4. Learned counsel for the petitioner submits that the impugned order is illegal and has been passed without considering the proper facts and law. It is contended that the learned trial court has erred in not appreciating the fact that though the respondent took the defence that the subject cheque was misused by the complainant, no complaint in support of this contention was placed on the record. It is next contended that the Trial Court failed to consider that one *Saleem*, who was examined as DW-2, had categorically stated that the petitioner/complainant had advanced the loan to the respondent and in discharge of the said liability, the respondent had issued the cheque in question. Insofar as Trial court's observations on the aspect of inconsistencies in the cross-examination of the petitioner are concerned, it is submitted that the same were due to lapse of the time and it cannot be a ground for acquitting the respondent.

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5. I have heard the submissions made by the learned counsel for the petitioner and perused the records available.

6. Before proceeding to the merits of the case, it would be fruitful to restate the legal position regarding offences under Section 138 NI Act. An offence under Section 138 NI Act is made out, when the conditions stipulated in the proviso to Section 138 are satisfied. The first condition is that the cheque, which has been drawn on an account maintained by the drawer, ought to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, must make a demand for the said money by giving a notice in writing to the drawer of the cheque within 30 days of receiving the information from the bank regarding the dishonour of the cheque. The third condition states that there should be a failure on the part of the drawer of cheque to make the payment of the amount under the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the said notice. When all these three conditions are fulfilled, then only an offence under Section 138 of the NI Act can be said to have been committed by the person issuing the cheque [Ref: MSR Leathers v. S. Palaniappan & Anr.[1], Charanjit Pal Jindal v. L.N. Metalics[2] and N. Harihara Krishnan v. J. Thomas[3].]

7. The allegations against the present respondent are that he had obtained a friendly loan of Rs. 1 lac from the petitioner and in discharge of

[1] (2013) 1 SCC 177
[2] (2015) 15 SCC 768
[3] (2018) 13 SCC 663

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the said liability had issued the subject cheque, which got dishonoured on presentation.

8. A perusal of the impugned order and the Trial Court records reveal that respondent did not dispute his signatures on the cheques in question however, stated that the a blank cheque was given by him to one *Saleem* i.e. a friend of the petitioner, with respect to some financial transaction and the same was misused by *Saleem*. The petitioner denied having any financial transaction with the complainant and denied the factum of receiving any legal notice from the complainant. The accused has chosen to rebut the presumption raised against him by relying on cross examination of CW1 i.e. the complainant and the documentary evidence exhibited by him.

9. In Basalingappa v. Mudibasappa **(2019) 5 SCC 418**, the Hon'ble Apex Court, after taking note of several judicial precedents, has summed up the relevant principles as under:

> *"25. We having noticed the ratio laid down by this Court in the above cases on Sections 118 (a) and 139, we now summarise the principles enumerated by this Court in following manner:*
>
> > *25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.*
> >
> > *25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.*
> >
> > *25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but*

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also by reference to the circumstances upon which they rely.
25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.
25.5. It is not necessary for the accused to come in the witness box to support his defence.”
(Emphasis supplied)

10. It has been the case of respondent that he was able to rebut the presumption raised in favour of holder/complainant by raising probable defence. The petitioner claims to have retired from Delhi Police as an ACP. It is claimed that in the first week of August 2019, the respondent had approached the petitioner for a loan of Rs. 1,00,000/-. On being satisfied with the respondent’s financial capability to return the same, the said sum was advanced as cash loan to the respondent on 16.08.2019. Indisputably, the grant of loan is not accompanied by any documents. As discernible from the record, the petitioner in his cross examination has stated that the respondent is known to him since 2012, however as per his legal demand notice exhibited as Ex. CW 1/3, it is stated that the respondent first came in contact with the petitioner in 2016. With respect to the advancement of loan, the petitioner in his cross examination has stated that the respondent had approached him through one *Saleem,* whereas in the complaint and evidence affidavit Ex CW1/A, it is stated that the respondent had approached him at his house and the same do not find mention of *Saleem*. Further, while in the demand notice the complaint had averred that the loan was advanced in presence of *Saleem* and *Karamvir,* in his cross-examination, it was stated that the loan was advanced in the presence of one *Ashok Sharma*. Neither

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Ashok Sharma nor Karamvir were examined by the petitioner in support of his stance. A perusal of the testimony of Saleem, who was examined as DW2 would show that *Saleem* had only deposed to the extent that he was told about the transaction by the complainant/petitioner and the accused/respondent in August 2019. The contention that the said loan amount was advanced in the presence of Saleem does not find mention in his testimony. The relevant extract of the testimony of *Saleem* has been reproduced below:-

> *"I know about the transaction of the present case. I know the accused Sh. Shahnawaz Khan since last 20 years and I know the complainant from the year 2002 as I was informer of the complainant as he was working with the Delhi Police. The transaction between accused and complainant is worth Rs. I lac. The complainant had advanced Rs. 1 lac to the accused at my request and the complainant had taken a cheque and driving license of the accused while advancing money. I am aware about the transaction and cheque as I was told about the same by both the accused as well as the complainant in August 2019."*

11. It is based on these indiscrepancies that the learned trial court concluded that respondent/accused had managed to rebut the presumption raised against him by showing that the case of the petitioner/complainant itself, is improbable and therefore, respondent ought to have been acquitted for the offence under Section 138 of the Negotiable Instruments Act. This court is inclined to concur with the decision of the trial court. The respondent was able to establish his defence on preponderance of probabilities. It is the opinion of the Court that the case of the petitioner, in light of the contradictions, pointed out a substantial doubt. After perusing the documents available on record, I believe the trial court decided correctly that the accused had successfully rebutted his presumption by highlighting

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these very inconsistencies in the case of the prosecution. It is further seen that once the burden of proof had shifted back to the petitioner, he was unable to prove his case beyond a reasonable doubt.

12. In view of the aforesaid facts and circumstances, this court finds no ground to grant leave to appeal.

13. Accordingly, the present petition stands dismissed alongwith the pending applications.

MANOJ KUMAR OHRI, J

JULY 25, 2024/*js*

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