



2024:DHC:9985



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.12.2024

+ **CRL.L.P. 98/2019**

GOPAL GUPTA

.....Appellant

versus

INDERJEET

.....Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Mehendra Pratap, Adv.
For the Respondent : Mr. Hemant Sharma, Adv

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

CRL.L.P. 98/2019

1. The present leave to appeal is filed against the judgment dated 19.11.2018 (hereafter '**impugned judgment**') passed by the learned Metropolitan Magistrate ('**MM**'), Central, Tis Hazari Courts, Delhi in Complaint Case No. 521120/2016 whereby the respondent was acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**').
2. For the reasons discussed below, leave to appeal is granted.
3. Petition stands disposed of.



CRL.A. /2024 (to be numbered)

4. During the pendency of the present petition, the complainant expired. This Court *vide* order dated 18.01.2024 substituted the complainant with the legal heirs namely – Kanchan (wife), Bhumika Gupta (Daughter), Kunal Gupta (son), Manish Gupta (son).

5. The complaint under Section 138 of the NI Act was filed at the instance of the complainant (since deceased). It is averred that the son of the respondent – Akashdeep had friendly relations with the son of the complainant – Kunal Gupta. It is alleged that Kunal Gupta advanced a sum of ₹1,00,000/- to Akashdeep on 23.12.2011, ₹1,00,000/- on 27.02.2012. It is alleged that thereafter the complainant advanced a sum of ₹2,00,000/- to Akashdeep on 11.02.2013. Further, on 11.02.2013, Bhumika Gupta advanced a sum of ₹1,00,000/- to Akashdeep. It is further alleged that Manish Gupta provided a sum of ₹1,00,000/- to Akashdeep on 23.12.2011 and a further sum of ₹1,00,000/- on 27.07.2012. It is thus the case of the complainant that a total sum of ₹7,00,000/- was advanced to Akashdeep by the complainant and his children.

6. It is alleged that Akashdeep provided various cheques for repayment of the loan amount, however, the same were dishonoured on presentation. It is however the case of the complainant that the interest accrued @3% per month on the loan for a period up to December 2012 was paid by Akashdeep. It is alleged that thereafter the respondent assured to repay the sum of ₹7,00,000/-, and the complainant agreed to abandon the claim for interest with effect from



January, 2013. It is the case of the complainant that it was agreed that should the respondent fail to make the payment of the loan amount in the manner as agreed then the complainant would be entitled to claim the entire interest due from January, 2013.

7. Subsequently, it is averred that the respondent issued a cheque bearing no. 449327 dated 20.02.2014 for a sum of ₹7,00,000/- in favour of the complainant. The said cheque, upon presentation, got dishonoured, and returned unpaid with the remarks '*Funds Insufficient*' vide return memo dated 24.02.2014. Subsequently, upon the non-payment of the amount despite the receipt of statutory notice, the complainant filed the present complaint.

8. The learned MM vide impugned judgment noted that the subject cheque belonged to the accused, was drawn on the account maintained by the accused, the same was dishonoured on presentation, and that despite the receipt of statutory notice, no payment was made. A contention on behalf of the respondent was made stating that the complainant was not duly authorised by his sons and daughter to file the complaint. It was argued that the complainant was not a competent witness *qua* his son – Manish Gupta and daughter – Bhumika Gupta who have not even come to depose before the Court. The learned MM noted that there existed no power of attorney executed by the complainant's son – Manish Gupta or daughter – Bhumika Gupta authorising the complainant to file the present complaint on their behalf.



9. It was noted that though the complainant deposed that he had been authorised by his son and daughter to file this complaint, and that he possessed full knowledge of the transaction between them and Akashdeep, complaint is filed without any written formal authorisation on behalf of the said children that too when they have not even come to depose in the matter and the same is not in consonance with law.

10. In regard to the presumption under Sections 118 and 139 of the NI Act, the learned MM noted that it was open for the respondent to lead evidence in defence, or rely on materials submitted by the complainant or circumstances to show the non-existence of consideration or the like. It was noted that the complainant, and his son – Kunal Gupta, in their cross-examination, admitted that they were in the business of money lending, and had no license for the same.

11. It was noted that it was not the case of the complainant that the whole money was advanced by him. The learned MM further noted that a person could be held liable under Section 138 of the NI Act if such person issued a cheque for discharge of the liability of another person, however, the person in whose favour such cheque had been issued should himself be entitled for the sum of money for which the cheque was issued or must possess some special authorization to file a complaint *qua* the other person.

12. It was noted that the present complaint was not maintainable *qua* Manish Gupta, and Bhumika Gupta to whom Akashdeep owed



money, and for whose liability as well the cheque had been issued by the respondent.

13. It was noted that Akashdeep, did not owe the money equivalent to that of the cheque to the complainant. Consequently, the learned MM noted that since the liability of the accused was less than the cheque amount, no prosecution under Section 138 of the NI Act could be made. The learned MM, therefore, acquitted the respondent of the offence under Section 138 of the NI Act. Aggrieved by the same, the complainant filed the present petition.

14. The learned counsel for the petitioner / complainant submitted that the learned MM erred in acquitting the respondent on the ground that the complaint was filed without any acceptable authorisation of the son- Manish Gupta, and daughter – Bhumika Gupta. He submitted that there was no occasion for the complainant to file any power of attorney on behalf of his son/ daughter because the subject cheque was issued by the respondent in favour of the complainant, and the complainant alone was competent to file and prosecute the said complaint.

15. He submitted that the learned MM failed to take into consideration that the issuance of the cheque was admitted, and the same was also mentioned in the agreement dated 06.02.2014 duly entered into between the parties. He submitted that the learned MM erred in holding that the person in whose favour the cheque has been issued himself should be entitled for the sum of money for which the



cheque has been issued, or there must be special authorization to file the complaint *qua* the other persons.

16. He submitted that the learned MM erred in holding that since the complainant was into the business of money lending, and had no license, the consideration was also unlawful. He submitted that in terms of the agreement dated 06.02.2014, the complainant was to receive the amount from the respondent. He submitted that the learned MM further erred in noting that the son of the respondent for whose liability the subject cheque had been issued did not owe any money equivalent to the cheque towards the complainant. He submitted that in terms of the agreement dated 06.02.2014, the respondent had undertaken to pay the entire amount to the complainant.

17. The learned counsel for the respondent submitted that the learned MM rightly acquitted the respondent of the offence under Section 138 of the NI Act. He submitted that in the absence of a valid power of attorney, the complaint was not maintainable in the first place. He submitted that even though the presumptions under Section 139 and 118 of the NI Act were raised against the respondent, the same had been rebutted by the respondent.

Analysis

18. It is trite law that a Court while considering the challenge to an order of acquittal ought to only interfere if the Court finds that the appreciation of evidence is perverse [***Rajaram s/o Sriramlulu Naidu (since deceased) through LRs: Criminal Appeal No. 1978 of 2013***].



19. The present case, however, relates to acquittal of an accused in a complaint under Section 138 of the NI Act. The restriction on the power of Appellate Court in regard to other offence does not apply with same vigor in the offence under NI Act which entails presumption against the accused. The Hon'ble Apex Court in the case of **Rohitbhai Jivanlal Patel v. State of Gujarat : (2019) 18 SCC 106** had observed as under:

“12. According to the learned counsel for the appellant-accused, the impugned judgment is contrary to the principles laid down by this Court in Arulvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] because the High Court has set aside the judgment of the trial court without pointing out any perversity therein. The said case of Arulvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] related to the offences under Sections 304-B and 498-A IPC. Therein, on the scope of the powers of the appellate court in an appeal against acquittal, this Court observed as follows : (SCC p. 221, para 36)

“36. Careful scrutiny of all these judgments leads to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law.”

*The principles aforesaid are not of much debate. In other words, ordinarily, the appellate court will not be upsetting the judgment of acquittal, if the view taken by the trial court is one of the possible views of matter and unless the appellate court arrives at a clear finding that the judgment of the trial court is perverse i.e. not supported by evidence on record or contrary to what is regarded as normal or reasonable; or is wholly unsustainable in law. Such general restrictions are essentially to remind the appellate court that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt and a judgment of acquittal further strengthens such presumption in favour of the accused. **However,***



such restrictions need to be visualised in the context of the particular matter before the appellate court and the nature of inquiry therein. The same rule with same rigour cannot be applied in a matter relating to the offence under Section 138 of the NI Act, particularly where a presumption is drawn that the holder has received the cheque for the discharge, wholly or in part, of any debt or liability. Of course, the accused is entitled to bring on record the relevant material to rebut such presumption and to show that preponderance of probabilities are in favour of his defence but while examining if the accused has brought about a probable defence so as to rebut the presumption, the appellate court is certainly entitled to examine the evidence on record in order to find if preponderance indeed leans in favour of the accused.”

(emphasis supplied)

20. It is also well settled 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**].

21. 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)



22. From a perusal of the impugned judgment, it is seen that the learned MM acquitted the respondent of the offence under Section 138 of the NI Act *primarily* on two grounds:

23. *Firstly*, the learned MM considered the contention of the defence that the complainant had not been authorised by his sons and daughter to file the complaint, and that he is not competent witness to depose on behalf of their children. The learned MM noted that in the absence of a power of attorney on behalf of son – Manish Gupta and daughter – Bhumika Gupta, the filing of the present complaint without any written formal authorization is legally untenable.

24. *Secondly*, and consequently the learned MM noted that the present complaint was not maintainable *qua* Manish Gupta and Bhumika Gupta to whom money was also owed, and for the discharge of whose liability as well, the subject cheque was issued by the respondent. In that light, the learned MM noted that respondent's son did not owe money equivalent to the cheque, that is ₹7,00,000/- towards the complainant. Consequently, the learned MM noted that the respondent was able to raise a probable defence that the liability towards the complainant was less than the cheque amount, and that the respondent was able to rebut the presumptions that existed in favour of the complainant.

25. In the opinion of this Court, the acquittal of the respondent in the present case is unsustainable, *inter alia*, for the following reasons:

26. At the outset, since the execution and signature on the cheque is not disputed, presumption under Section 138 and 118 of the NI Act is



raised against the respondent and in favour of the complainant. It is pertinent to note that the presumptions under Section 118 and 139 of the NI Act are not absolute, and may be controverted by the accused. In doing so, the accused ought to raise only a probable defence on a preponderance of probabilities to show that there existed no debt in the manner so pleaded by the complainant in his complaint/ demand notice or the evidence. Once the accused successfully raises a probable defence to the satisfaction of the Court, his burden is discharged, and the presumption ‘disappears.’ The burden then shifts upon the complainant, who then has to prove the existence of such debt as a matter of fact. The Hon’ble Apex Court in **Rajesh Jain v. Ajay Singh** (*supra*), in this regard has observed as under:

“41. In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words ‘until the contrary is proved’ occurring in Section 139 do not mean that accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist. [Basalingappa Vs. Mudibasappa (AIR 2019 SC 1983) See also Kumar Exports Vs. Sharma Carpets (2009) 2 SCC 513]

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44. The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling the burden may likewise shift to the complainant. It is open for him to also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact. In Kundanlal's case- (*supra*) when the creditor had



failed to produce his account books, this Court raised a presumption of fact under Section 114, that the evidence, if produced would have shown the non-existence of consideration. Though, in that case, this Court was dealing with the presumptive clause in Section 118 NI Act, since the nature of the presumptive clauses in Section 118 and 139 is the same, the analogy can be extended and applied in the context of Section 139 as well.

45. Therefore, in fine, it can be said that once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption 'disappears' and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his complaint case. Thereafter, the presumption under Section 139 does not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. [Basalingappa vs. Mudibasappa, AIR 2019 SC 1983; See also, Rangappa vs. Sri Mohan (2010) 11 SCC 441]"

(emphasis supplied)

27. In the present case, the ground on which the respondent has been acquitted is that since the money was advanced by the complainant and his children, the complainant himself was not entitled to the entire sum of money, that is, ₹7,00,000/-. The learned MM noted that the person in whose favour the cheque was issued must be entitled to the cheque amount or must have some special authorization to file a complaint *qua* the cheque of other person. It was noted that the present complaint was not maintainable *qua* Manish Gupta and Bhumika Gupta. Consequently, the learned MM noted that since the complainant himself was not entitled to the entire cheque amount



thereby making the cheque amount more than the liability owed by the respondent, the respondent was liable to be acquitted.

28. This Court has perused the record. The main thrust of the respondent's case is that the complainant did not have a written formal authorisation from his children to prosecute the case against the respondent, and that they failed to depose before the Court. Consequently, the cheque amount being more than the liability owed towards the complainant, the respondent was liable to be acquitted.

29. From a perusal of the record, it is evident that the respondent does not dispute entering into the agreement dated 06.02.2014 with the complainant and his children. The agreement records the following:

- a) The son of the respondent took ₹2,00,000/- from Kunal Gupta (₹1,00,000/- on 23.12.2011, ₹1,00,000/- on 27.07.2012), ₹2,00,000/- from the complainant on 11.02.2013, ₹1,00,000/- from Bhumika Gupta on 11.02.2013, ₹2,00,000/- from Manish Gupta (₹1,00,000/- on 23.12.2011, ₹1,00,000/- on 27.07.2012). The son of the respondent also agreed to pay interest @3% per month on the said loan amount.
- b) The son of the respondent issued several cheques for the discharge of liability being:
 - i) Cheque No. 064199 dated 05.11.2013 for ₹50,000/- and Cheque No. 190663 dated 05.11.2013 for ₹1,50,000/- in favour of Manish Gupta which were dishonoured due to insufficiency of funds;



- ii) Cheque No. 190660 dated 01.11.2013 for ₹2,00,000/- in favour of Kunal Gupta which was dishonoured on 04.11.2013 due to insufficiency of funds;
 - iii) Cheque No. 190656 dated 01.11.2013 for ₹1,00,000/- in favour of complainant towards the interest on the entire loan amount, which was dishonoured due to insufficiency of funds;
 - iv) A cheque for ₹1,00,000/- in favour of Bhumika Gupta which could not be presented at the request of the son of the respondent.
- c) The son of the respondent paid interest @3% per month on the loan amount upto December 2012, and since thereafter failed to pay the interest but assured to pay the entire interest together.
- d) When the complainant and his sons intended to initiate criminal proceedings, the respondent took it upon himself to pay the entire amount of ₹7,00,000/- with interest.
- e) The respondent assured to pay the complainant and his sons and stated that his retirement funds are yet to be released.
- f) The respondent issued a cheque bearing no. 449327 dated 20.02.2014 for a sum of ₹7,00,000/- in favour of the complainant.
- g) The respondent requested the complainant for financial assistance to the extent of ₹3,00,000/- to clear the liabilities owed by the respondent to five different Thrift & Credit Cooperative Societies. The complainant agreed to extend the



said financial assistance in the form of loan, and agreed that the amount would be paid directly by the complainant to the concerned societies in the name of the respondent.

30. Undisputedly, the respondent had entered into the agreement dated 06.02.2014 with the complainant and his children. The agreement itself materialises the liability owed by the respondent towards the complainant and his children. It then goes on to mention that the respondent accordingly issued the subject cheque for a sum of ₹7,00,000/- in favour of the complainant.

31. From a perusal of the agreement, it is apparent that after admitting to the liability owed towards the complainant and his children, the respondent issued the subject cheque for a total sum of ₹7,00,000/- in favour of the complainant alone. Since the cheque was issued in the name of the complainant, and the respondent after being cognizant of the fact that the money was owed to the complainant and his children had issued the cheque in the name of complainant alone, the complainant was competent to file and prosecute the case against the respondent.

32. In terms of Section 142 of the NI Act, no court can take cognizance of any offence punishable under Section 138 of the NI Act except upon a complaint made in writing by the “payee” or the holder in due course of the cheque. In the present case, since the cheque for the entire sum of ₹7,00,000/- was issued in the name of the complainant, it was the complainant who was the payee, and was also competent to file a complaint.



33. The respondent further sought to raise a defence that the complainant was liable to pay a sum of ₹3,00,000/- first to clear the dues owed by the respondent to various societies, and the subject cheque was presented without intimation. Such contentions, in the opinion of this Court, is untenable. Nowhere does the agreement dated 06.02.2014 mention that the subject cheque was to be presented only after the dues owed by the respondent to various Thrift & Credit Cooperative Societies were cleared. The respondent, in the opinion of this Court, is seeking to link two distinct transactions.

34. It is undisputed that the respondent had entered into the agreement with the complainant, pursuant to which the subject cheque was issued to the complainant. The subject cheque, on presentation, dishonoured for the reason “*Funds Insufficient.*” Thus, all the ingredients to constitute an offence under Section 138 of the NI Act are met.

35. The respondent was obligated to raise a probable defence in order to rebut the presumptions raised against him under Section 139 and 118 of the NI Act. Except for contentions that the complainant was not competent to file the complaint, and that the respondent was not liable to the entire cheque amount towards the complainant, the respondent has failed to raise a probable defence to rebut the presumptions raised against him.

36. The execution of the agreement dated 06.02.2014 is not denied which categorically records that the complainant was entitled to receive the cheque amount. The entitlement of the complainant of the



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cheque amount is detailed in the agreement duly signed by the respondent.

Conclusion

37. In view of the foregoing discussion, this Court is of the opinion that the respondent failed to rebut the presumptions raised against him under Sections 139 and 118 of the NI Act.

38. The impugned judgment dated 19.11.2018, acquitting the respondent of the offence under Section 138 of the NI Act is accordingly set aside.

39. List on 16.01.2025 for further directions. The respondent is directed to be present on the next date of hearing.

AMIT MAHAJAN, J

DECEMBER 24, 2024