$~23

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

\+ **CRL.L.P. 336/2019**

M/S LION INC. THROUGH ITS
PROP. SACHIN .....Petitioner

Through: Mr. Brijesh Kumar Singh, Advs.

versus

M/S. MULTIPLIERS REALBUILD PVT LTD.
& ORS .....Respondents

Through: Mr. Kapil Gupta, Mr. Ravi Kumar and Mr. Abhijeet, Advs. for R-1 and 2.

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

% **20.12.2024**

1. The present leave petition has been filed seeking leave to appeal against the judgment dated 10.01.2019 (hereafter '**impugned judgment**'), passed by the learned Metropolitan Magistrate, Saket Courts, New Delhi, in Complaint Case No. 470487/2016, whereby the respondents were acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**').

2. Briefly stated, the petitioner is alleged to be a sub-broker, who had provided services to the respondents by securing bookings for apartments in various real estate projects during the year 2012-2013. The petitioner facilitated six bookings for the respondents in projects developed by M3M and Supertech. The petitioner alleged that the respondents, after receiving brokerage from the developers for these bookings, issued cheques to settle the petitioner's brokerage dues.

3. The respondents issued three cheques towards part

payment of their liability, including Cheque No. 008363 dated 19.10.2015 for a sum of ₹7,84,096/-, drawn on Bank of Maharashtra, Sohna Road, Gurgaon. The petitioner accepted these cheques based on the assurance that they would be honoured. On presentation, the cheque was dishonored on 20.10.2015 with the remark "Payment Stopped by Drawer." It is alleged that the petitioner thereafter, issued a legal demand notice dated 19.11.2015, which was duly served to the respondents. However, the respondents failed to make payment within the statutory period of 15 days, necessitating the filing of the complaint.

4. The respondents denied having issued the cheques in question for the discharge of any legally enforceable debt or liability. They contended that the cheques were issued as a mere security in connection with flat bookings facilitated by the petitioner, which were later cancelled. The respondents further claimed that no payment was due as the transactions related to the bookings were voided upon their cancellation. They relied on email correspondences to substantiate their defence and maintained that the petitioner's claims were baseless.

5. The learned Trial Court, by the impugned judgment, acquitted the respondents of the offence under Section 138 of the NI Act and observed as under :

> *"Clearly the complainant has not deposed that the parties have agreed that irrespective of cancellation of bookings, brokerage is payable to the complainant. Rather the complainant has corroborated the defence of accused that in case of cancelled bookings, brokerage is not payable and brokerage is payable to the complainant only if the same has been paid to the accused. Therefore, the complainant has to prove that accused has received the brokerage from the concerned developers but nothing has been brought on record by either of the parties to show that accused persons have*

received the brokerage for cancelled bookings.
16. Further the accused has produced the e mails Mark DW/A, Mark D1/X, Mark D1/Y & Mark D1/Z alongwith Certificate U/s 65 B of Indian Evidence Act and as per these e mails, the bookings done in the name of Mrs Chinky Khaneja, Bharat Sharma, Vineet Malhotra and Mrs Pushplata stand cancelled as per the record of developers. The accused has deposed that these bookings have been cancelled. Though the complainant has argued that these e mails are forged and fabricated, however, the complainant has not summoned the record From concerned developers to debut the record produced by the accused Further, throughout the trial, complainant has not disclosed the policy for payment of brokerage in case bookings got cancelled. Thus, the defence of accused seems probable.
17. Further admittedly, accused persons have given undated cheques to the complainant which corroborates the defence of accused that the payment of brokerage was conditional and in case of cancellation of bookings, brokerage
was not payable.
18. During Final arguments, it has been vehemently argued on behalf of complainant that accused persons have kept changing their defences and have taken inherently contradictory defences and thus, Failed to prove their
defence. As far as this plea is concerned, the accused persons cannot be convicted merely on the ground that accused persons have changed their defences or have taken inconsistent or contradictory defences, specifically when the complainant has Failed to prove its own case.
19. In view of the above discussions and reasons, in the opinion of this Court, the presumptions arising in favour of the complainant U/s 118 &139 of the Act have been rebutted by the accused by preponderance of probabilities while complainant has Failed to prove his case beyond reasonable doubts. Resultantly, this court Finds the accused no. 1 Multipliers Realbuild Pvt. Ltd., accused no. 2 Faisal Sheikh, Director Multipliers Realbuild Pvt. Ltd. and accused no. 3 Saif Sheikh, Director Multipliers Realbuild Pvt. Ltd. not guilty for the offence punishable U/s 138 NI Act. Hence, they stand acquitted."

6. Aggrieved by the impugned judgment, the petitioner has filed the present petition.

7. The learned counsel for the petitioner submits that the

finding of acquittal ought to be reversed as the same is only based on conjectures, and not cogent evidence. He submits that the learned Trial Court failed to appreciate that the presumption under Sections 118(a) and 139 of the NI Act operates in favour of the petitioner. Once the issuance of the cheque is admitted or established, it is presumed to have been issued in discharge of a legally enforceable debt or liability unless rebutted by the accused. The respondents failed to discharge the burden of rebutting this statutory presumption.

8. The learned counsel submits that the reliance placed by the respondents on emails to substantiate the cancellation of bookings is misplaced. These emails were generated after the filing of the complaint and could not have been relied upon to rebut the presumption under Section 139 of the NI Act. Moreover, these emails were not contemporaneous documents and were introduced belatedly during trial to bolster the respondents' defence.

9. He submits that the respondents, in their statement under Section 313 of the CrPC, admitted issuing the cheques but sought to evade liability by claiming that they were issued as security for bookings that were allegedly cancelled. The petitioner contends that this explanation is an afterthought and has no basis in evidence.

10. He submits that the respondents failed to produce any credible evidence to establish the cancellation of bookings or to prove that no liability existed as on the date of issuance of the cheques. The petitioner emphasized that merely asserting cancellation without corroborating documents cannot be treated as sufficient to rebut the statutory presumption under Sections

118(a) and 139 of the NI Act.

11. He submits that the learned Trial Court erred in holding that the petitioner failed to establish a legally enforceable debt. The evidence produced by the petitioner, including the cheques, return memo, legal notice, and acknowledgment by the respondents, conclusively demonstrates that the debt existed, and the cheques were issued in discharge of this liability.

12. 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**].

13. 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 ismore 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)

14. 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**].

15. 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. <u>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)</u> : 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"?*
>
> *xxx xxx xxx*
>
> *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.*

xxx xxx xxx

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)

16. Suffice it to say that under Sections 118(a) and 139 of the NI Act, a statutory presumption exists in favour of the holder of the cheque that it was issued in discharge of a legally enforceable debt. However, these presumptions are rebuttable, and the accused can discharge the burden by raising a probable defence supported by material evidence.

17. In the present case, the respondents rebutted the presumption by relying on email correspondences (Ex. DW/A, D1/X, D1/Y, and D1/Z) supported by the certificate issued under Section 65B of the Indian Evidence Act, 1872, which demonstrated the cancellation of three bookings. The certificate validated that the emails were generated from a computer system regularly used for such communication and had not been tampered with or altered. The respondents contended that for the remaining three bookings, which were successfully completed, the brokerage had already been paid.

18. The petitioner, while arguing that the emails were forged and fabricated, failed to either object to the admissibility of the electronic evidence during the trial or summon any independent certification to challenge the Section 65B certificate submitted by the respondents. Furthermore, no contrary records from the developers involved in the flat bookings were presented to

dispute the cancellation. The trial court, therefore, rightfully accepted the electronic evidence as admissible and relied upon it while concluding that no enforceable debt or liability existed.

19. The learned Trial Court further rightly observed that the complainant failed to disclose the specific nature and details of the transactions between the parties in the initial complaint, the legal notice, or in his statement under Section 251 of the CrPC. The complaint merely alleged that cheques were issued in discharge of a liability without specifying the underlying transactions or circumstances leading to their issuance. It was only during the trial, particularly through the cross-examination of the complainant and the presentation of the defence evidence, that the nature and details of the transactions began to emerge.

20. During cross-examination, the petitioner admitted that if bookings were cancelled, payments would not be due. However, this crucial fact was omitted in the complaint, the legal notice, and the statement under Section 251 of the CrPC. This omission raises significant doubts about the petitioner's claim of an enforceable debt. Furthermore, the petitioner did not address why the alleged liability persisted after the cancellations or provide a clear explanation for issuing a fresh cheque dated 19.10.2015.

21. 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 <u>probable defence</u> 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]***
>
> **xxx**
>
> ***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)

22. The learned Trial Court rightly relied on the emails submitted by the respondents, which were consistent with the evidence and effectively rebutted the statutory presumption. It is pertinent to note that the petitioner's failure to contest these emails undermined its claim. The petitioner did not produce contemporaneous evidence to substantiate the alleged liability, nor did they explain the respondents' claim that no debt was due after the cancellations.

23. The learned Trial Court held that the petitioner failed to establish the existence of a legally enforceable debt or liability, as required under Section 138 of the NI Act. The court noted that:

- The respondents demonstrated a consistent and plausible defence supported by emails indicating cancellation of bookings.

- The petitioner's omission to address these cancellations in the complaint or legal notice further weakened their case.
- The burden of proof shifted back to the petitioner, who failed to discharge it satisfactorily.

24. It is pertinent to note that a decision of acquittal fortifies the presumption of innocence of the accused, and the said decision must not be upset until the appreciation of evidence is perverse.

25. Upon a consideration of the facts and circumstances of the case, this Court finds no such perversity in the impugned judgment so as to merit an interference in the finding of acquittal. Consequently, this Court finds no reason to entertain the present petition.

26. The present leave petition is accordingly dismissed.

AMIT MAHAJAN, J

DECEMBER 20, 2024