IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on:20.08.2024*

+ **CRL.L.P. 530/2019 & CRL.M.A. 36666/2019**

SH. S.P. DUA ..... Petitioner

versus

SH. O.P. DEWAN ..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Ajay K Singh, Adv. with appellant in person.

For the Respondent : Mr. R.P. Luthra & Mr. Himanshu Sharma, Advs.

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present leave to appeal is filed for setting aside the judgment dated 13.05.2019, passed by the learned Metropolitan Magistrate ('**MM**'), Karkardooma Courts, Delhi, in CT Case No. 59284/2016, whereby the respondent was acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**').

2. The complaint was instituted by the petitioner due todishonour of a cheque drawn by the respondent for a sum of ₹4.25 lakhs. It is

alleged that the petitioner/complainant had advanced a friendly loan of ₹4.25 lakhs to the respondent for a period of one year in March, 2011. In order to discharge his liability, the respondent had allegedly issued a cheque dated 15.03.2013 in favour of the petitioner. It is alleged that the said cheque when presented for clearance was returned unpaid by the respondent's banker on account of insufficient funds. It is alleged that a legal notice dated 22.04.2013 was sent to the respondent through speed post, however, despite the same, the respondent failed to make the payment within the stipulated statutory period. The same led to the filing of the subject complaint.

3. The respondent admitted his signature on the cheque in dispute, however, he denied having taken any loan from the petitioner and raised the defence that he had instead advanced a loan of ₹5.95 lakhs to the petitioner on different occasions. He stated in his statement under Section 313 of the CrPC that when the complainant failed to repay the loaned amount, the parties arrived at a settlement dated 21.08.2011 for ₹4.25 lakhs. He stated that out of the said amount, the amount of ₹50,000/- was received on 21.08.2011 and the remaining amount of ₹3.75 lakhs was received on 23.08.2011 against a written acknowledgement. He further stated that after the settlement the parties maintained cordial relations. The petitioner during one visit took away a signed cheque from the office in the absence of the respondent.

4. The complainant had contested that the settlement was for a sum of merely ₹50,000/- and the second amount mentioned in the settlement was '₹375' and not ₹3.75 lakhs.

5. The learned Trial Court, by the impugned order, acquitted the respondent of the offence under Section 138 of the NI Act, noting that the case of the petitioner was full of contradictions and inconsistencies and finding the claim of the petitioner that the second amount on the settlement was merely ₹375 instead of ₹3.75 lakhs to be rather absurd. It was also observed that the respondent had been able to rebut the presumptions under Sections 118 (a) and 139 of the NI Act as the documents on record and the testimony of DW2 corroborated his defence.

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

7. The learned counsel for the petitioner submitted that the finding of acquittal ought to be reversed as the impugned judgment is based on merely surmises and no cogent evidence.

8. He submitted that the learned Trial Court wrongly concluded that there was no proof of the petitioner having advanced a loan of ₹4,25,000/- to the respondent.

9. He further submitted that apart from the respondent's statement under Section 313 of the CrPC, no other material was placed on record by the respondent to prove that he had extended a loan of ₹5,95,000/- to the petitioner. He submitted that the respondent failed to disclose when and on how many dates has he paid the said amount. He

submitted that once the petitioner had denied having received any loan of ₹5,95,000/-, the said plea could not have been accepted in the absence of supporting evidence.

10. He further submitted that the learned Trial Court failed to consider the Suspension order of the respondent, which would show that the respondent was under suspension for a period of 5 years. He submitted that the same makes the plea of the respondent that he had advanced a loan of ₹5.95 lakhs to the petitioner unbelievable.

11. He submitted that there was no settlement between the parties that the respondent would vacate the property after receiving the amount of ₹4.25 lakhs.

12. He submitted that the learned Trial Court erroneously concluded that the settlement was arrived at ₹4.25 lakhs and that the figure 375 stood for ₹3.75 lakhs.

13. He submitted that the figure 375 cannot be taken as ₹3.75 lakhs, and that no transaction of ₹3.75 lakhs had been made between the parties. He submitted that contrary to the respondent's submission, the date of handing over the rental premise is 21.08.2011 instead of 23.08.2011.

14. The learned counsel for the respondent defended the impugned judgment. He submitted that the findings of the learned Trial Court in the impugned judgment suffer from no such infirmities that warrant the interference of this Court.

15. He submitted that the respondent had adequately rebutted the presumptions under Sections 118 and 139 of the NI Act by

establishing his defence of not having borrowed any loan from the petitioner and also not having issued the cheque in dispute in favour of the petitioner.

16. He submitted that the amount of ₹4.25 lakhs was paid by the petitioner to the respondent in the year 2011 against a settlement between the parties and the respondent had never taken any loan from the petitioner.

ANALYSIS

17. It is trite law that a Court while considering the challenge to an order of acquittal, in exercise of jurisdiction under Section 378 of the CrPC, is empowered to reconsider the evidence on record and reach its own conclusions, however, it is to be kept in mind that there is a double presumption of innocence in favour of the accused. High Court ought to only interfere with the finding of acquittal if it finds that the appreciation of evidence is perverse [***Rajaram s/o Sriramlulu Naidu (since deceased) through LRs*****:Criminal Appeal No. 1978 of 2013**].

18. The Hon'ble Apex Court in the case of ***Chandrappa v. State of Karnataka*****: (2007) 4 SCC 415** has expounded upon the powers of the Appellate Court while dealing with an order of acquittal:

> *"**42.** From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:*
> *(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*
> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate*

court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

19. The present case concerns the offence under Section 138 of the NI Act. 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. At the outset, it is relevant to note that the signature of the petitioner on the cheque in dispute has not been denied. It is settled 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 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 said presumptions can be controverted by the accused by raising a probable defence against the existence of a legally enforceable debt or liability. It is settled law that it is not necessary for the accused to conclusively establish that there was no debt/liability. In such circumstances, the presumption ceases to act to the benefit of the complainant and disappears. The onus then again shifts on the complainant. The Hon'ble Apex Court in the case of ***Rajesh Jain v. Ajay Singh* : 2023 INSC 888** had summarized the law as to how the accused can discharge the burden of the presumptions. The relevant portion of the judgment is reproduced hereunder:

> *"40. The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of 'preponderance of probabilities', similar to a defendant in a civil proceeding.* ***[Rangappa vs. Mohan (AIR 2010 SC 1898)]***
> *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]***
> *42. In other words, the accused is left with two options. The first option-of proving that the debt/liability does not exist-is to lead defence evidence and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second*

option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case. ***The preponderance of probability in favour of the accused's case may be even fifty one to forty nine and arising out of the entire circumstances of the case, which includes: the complainant's version in the original complaint, the case in the legal/demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his 313 statement or at the trial as to the circumstances under which the promissory note/cheque was executed. All of them can raise a preponderance of probabilities justifying a finding that there was 'no debt/liability'*. *[Kumar Exports and 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)

22. In the present case as well, the respondent has sought to prove his case on preponderance of probabilities that the cheque in dispute was not issued in discharge on any legally enforceable debt. The defence case, in essence, is that the cheque in dispute was taken by the petitioner from the respondent's office in his absence. Furthermore, the respondent had not taken any loan from the petitioner. It was argued that the amount of ₹4.25 lakhs was paid by the petitioner to the respondent as part of a settlement dated 21.08.2011 in respect of an earlier loan of ₹5.95 lakhs that had been extended by the respondent to the petitioner. It was argued that the parties had agreed *via* the settlement that after the payment of the settlement amount of ₹4.25 lakhs, the respondent would hand over the possession of the property rented by him from the petitioner. It was argued that as the remaining consideration amount of ₹3.75 lakhs was paid on 23.08.2011, the property was also vacated by him on the said date.

23. The complainant/ petitioner has contested the same and argued that no transaction for ₹3.75 lakhs ever took place between the parties. It is also argued that the possession of the property was handed over on 21.08.2011 itself.

24. The learned Trial Court took note of the defence of the respondent and rightly observed that the documents on record, including the settlement agreement, corroborate the defence of the respondent regarding the settlement and that a payment of ₹50,000/-

was made by the petitioner to the respondent on 21.08.2011, and a sum of Rs. 3.75 lakhs was paid on 23.08.2011. The learned Trial Court had also rejected the claim of the petitioner that ₹50,000/- was the total repayment amount paid by the petitioner, and the second amount mentioned in the settlement was merely ₹375/- and not ₹3.75 lakhs. It was observed that it was improbable that handover of possession would be delayed merely for ₹375. While it has been argued that the sum of ₹375 cannot be read as ₹3.75 lakhs, the learned Trial Court has elaborated as to why it finds the same to be absurd.

25. It is also relevant to note that while the petitioner in his post summoning evidence denied that there was any condition mentioned in the settlement agreement regarding possession of the property being handed back to him on payment of ₹375, in view of the aforesaid discussion, given the peculiar facts of the case, the same is not sufficient to bely the defence raised by the respondent.

26. While the principle of not disturbing the findings of the Trial Court in appeal when two alternative but reasonable views are possible may not be applicable with the same rigour in matters relating to offence under Section 138 of the NI Act, however, this Court finds no reason to interfere in the findings of the Trial Court in this regard.

27. Moreover, as rightly appreciated by the learned Trial Court, the testimony of Mr. Pawan Sobti (DW2), a friend of the respondent before whom the sum of ₹3.75 lakhs was received by the respondent, also corroborates the defence of the respondent. DW2 has deposed that he had visited the house of the petitioner with the respondent on

23.08.2011. He has stated that the petitioner asked the respondent about the keys of the tenanted premises and produced the settlement. He stated that the petitioner had read the terms of the settlement before him and stated that he was paying the balance amount of ₹3.75 lakhs as final settlement for the loan taken by him. Moreover, he has also stated that the respondent thereafter signed a paper with a revenue stamp affirming receipt of ₹4.25 lakhs. The petitioner has argued that DW2 is not a trustworthy witness, however, no cogent argument has been present to doubt the credibility of the evidence of DW2. A bare perusal of the record shows that DW2 stood by his testimony during cross-examination and the petitioner could not dent DW2's evidence. DW2 denied the suggestion that the sum of ₹4.25 lakhs was paid to the respondent by the petitioner and maintained that he was present on 23.08.2011 when the sum of ₹3.75 lakhs was paid by the petitioner to the respondent at the petitioner's house.

28. The learned Trial Court also noted that the evidence of the complainant was on a shaky ground due to the discrepancies in the version of the complainant. A bare perusal of the petitioner's statement and cross-examination shows that there are evidently flagrant inconsistencies. The learned Trial Court has rightly noted that the petitioner on multiple occasions contradicted his own stand. The relevant portion of the impugned order in this regard is reproduced hereunder:

> "*12. Perusal of entire record including the evidence on record would reveal that the case of the complainant is on a shaky ground.*

The version of the complaint is full of contradictions and inconsistencies.
13. It is the admitted case of both the parties that the accused was a tenant of the complainant. Accused claimed that as part of the settlement, it was agreed that accused would vacate the tenanted premises after receiving the settlement amount of Rs. 4.25 Lacs, He claimed that Rs. 50,000/- was received by him on 21.08.2011 and remaining Rs. 3.75 Lacs was received on 23.08.2011 on which date the possession was handed back to the complainant.
14. The complainant admitted that he had borrowed a loan from the accused. Initially, during his cross-examination, the complainant stated that he had borrowed a loan of Rs. 50,000/- from the accused. He admitted that dispute arose with regard to the repayment and quantum of the same. The complainant claimed that accused demanded Rs. 10 Lacs from him. Later, during his cross-examination, complainant changed his stand and contradicted himself by claiming that the loan was only for Rs. 5000/-. He stated that the accused demanded Rs. 50,000/-including interest and that the complainant repaid the said amount on 21.08.2013.
15. The complainant initially claimed that the loan in question of Rs. 4.25 Lacs was advanced by him on 21.08.2011 and that the document i.e. acknowledgement was executed on the same date. Later in his cross-examination, he admitted that the said document was infact executed on 23.08.2011 on which date, the accused claims to have received the remaining settlement amount. During the course of trial, the complainant introduced a new story. In his reply to the notice sent by the accused, complainant had claimed that on 22.03.2011, he had visited the house of the accused and saw two unknown persons demanding Rs. 5 Lacs from the accused on gun point. He claimed that in order to help the accused, on 23.03.2011, he advanced the loan in question to the accused. During cross-examination, however, the said date was also disputed by the complainant and he again contradicted himself and claimed that he had visited the house of the accused on 22.08.2013 and not on 22.03.2011. Now he claimed to have advanced the loan in question to the accused on 23.08.2013."

29. It is argued by the petitioner that the said observations of the learned Trial Court are erroneous and based on presumptions. It is also stated that the learned Trial Court has wrongly noted the date in

Paragraph 15 as 23.03.2011 instead of 23.08.2011. The inaccuracy in recording the date of visit does not improve the case of the petitioner.

30. The learned Trial Court also took note of the written acknowledgment, and found the same to be a mere receipt. It was noted that there was no mention of any loan in the same.

31. The learned Trial Court also made observations as to the fact that while the petitioner made claims that he had arranged the sum from his relatives, however, he examined none of his relatives and neither did he produce any evidence to substantiate the same.

32. From appreciation of evidence, in the opinion of this Court, the respondent has been able to satisfy the test of preponderance of possibilities and rebut the presumptions stipulated in Sections 118 and 139 of the NI Act.

33. In view of the aforesaid discussion, this Court finds no such perversity in the impugned order so as to merit an interference in the finding of acquittal.

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

AMIT MAHAJAN, J

AUGUST 20, 2024