



2024:DHC:6396



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

% Date of Decision: 24.07.2024

+ **CRL.LP. 346/2024 and CRL.M.A. 21485/2024**

SMT. DAYA RANI

.....Petitioner

Through: Mr.Anil Kumar Thakur, Advocate

versus

RAJEEV GULATI & ANR.

.....Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present application/petition, the petitioner seeks leave to appeal against the judgement of acquittal dated 17.05.2024 passed by the learned MM in Complaint Case No. 5866/2017 titled "*Smt. Daya Rani v. Rajeev Gulati*" whereby the respondent No.1/accused has been acquitted of the charges under Section 138 of the Negotiable Instruments Act, 1881.
2. The facts, as per the complaint, in nutshell are that the complainant/petitioner and accused/respondent No.1 were known to each other. In May 2015, respondent No. 1 approached the petitioner and requested for financial help to the tune of Rs.1,00,000/- for meeting some urgent requirements i.e., to extend his business and assured the petitioner to return the same within a period of one year. Consequently, the petitioner had given a sum of Rs.50,000/- vide cheque bearing No.095135 dated 30.05.2015 and further a sum of Rs.50,000/- vide cheque bearing No.095147

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dated 18.10.2015. After the stipulated period of time, upon petitioner's repeated requests, respondent No.1 issued a post-dated cheque bearing No.013405 dated 15.07.2017 for Rs.1,00,000/-. However, on presentation, the said cheque got dishonoured with the remarks 'Refer to Drawer'. A legal demand notice dated 27.07.2017 was issued to respondent No.1 and upon his failure to repay the amount, the underlying complaint case came to be filed.

3. The petitioner's challenge to the impugned judgement is premised on the ground that there was no material placed on record by respondent No.1 to show that he had made part-payment apart from a counterfoil of account, and that the learned trial court has passed the judgement without due consideration that respondent No. 1 failed to adduce any evidence in support of his defence.

4. At the time of framing of the Notice against respondent No.1 on 03.05.2019, respondent No.1, while presenting his plea of defence, acknowledged that he had taken two loans from the petitioner and paid the first loan in entirety. With respect to the second loan, he admitted that while partial payments were made, there were still five instalments, remaining to be paid. Although respondent No.1 admitted his signatures on the subject cheque, he denies having received any legal demand notice.

5. Before proceeding to deal with the merits of the case, this Court deems it 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. Metalics² and N. Harihara Krishnan v. J. Thomas³.]

6. As per the scheme of NI Act, once the accused admits signature on the cheque in question, certain presumptions are drawn, which result in shifting of the onus on the accused. The legal position as regards presumption raised under Section 139 read with Section 118 NI Act has been succinctly put by the Supreme Court in the case of Basalingappa v. Mudibasappa⁴. It was observed that:-

“xxx

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:

¹ (2013) 1 SCC 177

² (2015) 15 SCC 768

³ (2018) 13 SCC 663

⁴ (2019) 5 SCC 418



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 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.

xxx”

7. In order to discharge the burden of the aforementioned liability, it has been contended by learned counsel for respondent No.1 that there are inherent inconsistencies in the version of the petitioner. Firstly, to refute the argument that respondent No.1 has not paid any amount to the petitioner in order to discharge his liability, respondent No.1 stated that he had partly returned the loan amount to the petitioner in her bank account and that



further his remaining liability was only of Rs.32,000/-. Respondent No.1 has been consistent in his defence as seen during the plea taken under Section 251 CrPC as well as in the application filed under Section 145 (2) NI Act and the fact that the entries in the account of the petitioner matched with what the accused contended raises a credible defence and therefore, it can be said that he rebutted the presumption against him. Further, a perusal of records would show that it is the petitioner, who on being asked about the said deposited amount in her bank account gave inconsistent answers regarding the source of the said money. The petitioner claimed that the amount paid by respondent No.1 were towards rental amount but was unable to prove the rent agreement to substantiate the said stand.

8. In light of the settled legal position and the factual situation as enumerated in the impugned judgement and reiterated hereinabove, this Court is inclined to concur with the decision of the trial court. Further, as observed, that the case of the petitioner suffers from defect as she admits to one payment of Rs.6,750/- made on 03.07.2015, a few months after the first loan, thus stretching the case of defence and reducing the liability of the petitioner by Rs.6750/-. Additionally, given that there has been part satisfaction of the liability under the subject cheque by respondent No.1, the petitioner ought to have made the endorsement as required by Section 56 of the NI Act. The decision of the Hon'ble Supreme Court in Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel & Anr⁵ is apt on the fact situation and the relevant extract reads as under:

“33. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording part-payment of the

⁵ (2022) SCC OnLine SC 1376



debt in the cheque or in a note appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part-payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part-payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

xxx

34.2 If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque.

34.3 When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted.”

9. From the above, it is clear that in case a cheque is issued for a certain amount and before its presentation, part of the said amount is paid by the drawer of the cheque, then the drawee has to necessarily/mandatorily make an endorsement of the aforesaid part-payment upon the cheque and only then the cheque can be presented for encashment. If the said endorsement is not made, then even if the said cheque is dishonoured upon presentation, the



same does not make out an offence under Section 138 NI Act, since the cheque does not represent 'legally enforceable debt' at the time of its presentation/encashment.

10. Further, a decision of acquittal, strengthens the presumption of innocence in the favour of the accused. At the same time, the appellate court, while considering a leave to appeal, has a duty to satisfy itself if the view taken by the trial court is both possible and plausible. The appellate court should be slow in reversing an order of acquittal passed by the trial court.⁶

The principles guiding the Court in such situations has been succinctly delineated by Supreme Court in Anwar Ali & Anr. v. State of Himachal Pradesh⁷ in the following terms: -

“xxx

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in para 20 of the aforesaid decision, which reads as under: (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189])

“20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [1994 Supp (3) SCC 665], Gaya Din v. Hanuman

⁶ Jafarudheen & Ors. v. State of Kerala, (2022) 8 SCC 440,

⁷ (2020) 10 SCC 166



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*Prasad [(2001) 1 SCC 501], Arulvelu [Arulvelu v. State, (2009) 10 SCC 206] and Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636]”
xxx”*

11. In view of the aforesaid discussion, this Court finds no ground to grant leave to appeal. Consequently, the leave petition is dismissed alongwith the pending application.

**MANOJ KUMAR OHRI
(JUDGE)**

JULY 24, 2024
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