IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:24.12.2024

\+ **CRL.L.P. 598/2019**

SMT. KAMLESH .....Appellant

versus

SHRI TEJPAL .....Respondent

Advocates who appeared in this case:

For the Appellant : Mr. C.M. Grover & Ms. Payal Budhiraja, Advs. with appellant in person

For the Respondent : Mr. R.K. Burman, Adv. (through VC)

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

CRL.L.P. 598/2019

1. The present leave to appeal is filed against the judgment dated 24.07.2019 (hereafter '**impugned judgment**') passed by the learned Additional Sessions Judge ('**ASJ**'), North District, Rohini, Delhi in Criminal Appeal No. 10/2019 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.

<u>CRL.A. ____________/2024 (to be numbered)</u>

4. It is the case of the appellant that on an urgent requirement of the respondent, the appellant had advanced a friendly loan for a sum of ₹6,40,000/- to the respondent in cash. It is alleged that thereafter, the respondent, in discharge of his liability, had issued a cheque bearing no. 000049 dated 05.06.2015 for a sum of ₹6,40,000/-. Subsequently, on presentation, the subject cheque returned unpaid with the remarks *"Funds Insufficient."* Thereafter, the appellant sent a legal demand notice dated 26.06.2015. Subsequently, since the payment was not made within 15 days of the receipt of the demand notice, the appellant filed a complaint under Section 138 of the NI Act.

5. The respondent, in his statement, under Section 313 of the Code of Criminal Procedure, 1973 ('**CrPC**') denied taking any loan from the appellant. He stated that in December, 2014, it was infact the husband of the appellant that requested the respondent to advance a loan to enable the husband of the appellant to purchase a taxi for he was unemployed. The respondent stated that the appellant's husband's service in police was terminated. For this reason, the appellant's husband wanted to purchase a taxi and took a loan of ₹6,40,000/- from the respondent.

6. He stated that the appellant is the bua of the respondent's wife. He stated that for this reason, he acceded to the request of the

appellant's husband. He further stated that the appellant's husband was working with him as a driver in his taxi. He stated that he handed over the cheque to the appellant on the condition that she would produce a guarantor for the loan amount. He stated that since the appellant failed to produce the guarantor, he did not honour the cheque. He stated that he did not borrow any loan from the appellant. He further stated that the appellant did not return the cheque in question despite several requests, and also misused the cheque.

7. The learned Metropolitan Magistrate ('**MM**') *vide* order dated 29.10.2018 convicted the respondent of the offence under Section 138 of the NI Act. It was noted that the main defence of the respondent was that the cheque was given as a loan but when the appellant failed to produce guarantee, he did not keep the money in the account. It was noted that the respondent failed to show that he possessed sufficient arrangement outside the bank to honour the cheque should the appellant produce the guarantor and presented the cheque for encashment. It was noted that the presumption existed in the favour of the appellant and the defence brought by the respondent failed to inspire confidence. Consequently, the respondent was convicted under Section 138 of the NI Act.

8. The learned ASJ by impugned judgment acquitted the respondent of the offence under Section 138 of the NI Act. It was noted that the appellant deposed that she is running a dairy with 8 buffaloes, and that the appellant is not paying any Income Tax. It was noted that the husband of the appellant was an agricultural labour, and

the appellant could not estimate her income from animal husbandry. It was noted that no purpose for the advancement of loan was specified.

9. The learned ASJ also took into consideration that the respondent was in the business of Tours and Travels for the last 10 years, and had paid Income Tax for the years 2013-2018. It was noted that as per the deposition of the respondent, he had two vehicles, that is, a Scorpio, and Versa. As per the deposition of the respondent, these vehicles were being driven by drivers, and the respondent's house was his ancestral property. It was noted that the respondent appeared to be more economically sound in comparison to the appellant. It was noted that the respondent admitted his signature on the cheque, and deposed that after the cheque got bounced, he made a police complaint against the appellant.

10. Considering the aforesaid, the learned ASJ acquitted the respondent of the offence under Section 138 of the NI Act while specifically noting that the respondent had successfully rebutted the presumptions raised against him.

11. Aggrieved by the impugned judgment, the appellant has filed the present appeal.

12. The learned counsel for the appellant submitted that the learned ASJ erred in acquitting the respondent of the offence under Section 138 of the NI Act. He submitted that since the signature on the subject cheque was not disputed, the presumptions under Section 139 and 118 existed in the favour of the appellant and against the respondent.

13. He submitted that the fact that the respondent contends that he had advanced the subject cheque, and yet failed to keep sufficient funds in his account, itself manifested the *mala fide* intention of the respondent and ought not to be overlooked.

14. He submitted that the respondent failed to rebut the presumptions raised against him under Section 139 and 118 of the NI Act, and consequently prayed that the impugned judgment be set aside.

15. The learned counsel for the respondent submitted that the learned ASJ rightly acquitted the respondent of the offence under Section 138 of the NI Act. He submitted that the respondent had raised a probable defence and had also rebutted the presumptions under Section 139 and 118 of the NI Act.

16. He submitted that since the appellant failed to show that she had the financial means to advance the loan, the learned ASJ acquitted the respondent of the offence under Section 138 of the NI Act. He submitted that the fact that the loan was advanced without any written proof casts a doubt in the story of the appellant. He submitted that since the respondent was more economically sound than the appellant, the learned ASJ rightly acquitted the respondent.

17. He submitted that the respondent only had to raise a probable defence to dislodge the presumptions under Section 118 and 139 of the NI Act, which having been done, the respondent was rightly acquitted of the offence under Section 138 of the NI Act.

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)*
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> > *"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."*
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> *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*

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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. <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"?

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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. 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 appellant.

23. On a perusal of the record, it is seen that right from the time of framing of notice, the statement of the respondent under Section 313 of the CrPC, and during the course of the trial, the respondent denied taking any loan from the appellant. The respondent, however, did not dispute the issuance of the cheque in question, or his signatures on the cheque. He consistently maintained that it was in fact the respondent who had advanced the loan to the appellant.

24. During cross examination, the respondent deposed that he has been doing the business of Tours and Travels for the last 10 years and also paid Income Tax for the years 2013-2018. He deposed that he possessed two vehicles, and that these vehicles were being driven by drivers. He deposed that the house is his ancestral property. He maintained that the signatures in the cheque were filled by him but stated that after the cheque got bounced, he made a police complaint against the appellant. It was noted that while the respondent had not filed the copy of such complaint in the court record, he voluntarily stated that he had a copy with him. It was further noted that the

counsel for the appellant did not ask the respondent to produce the copy of the complaint before the Court.

25. 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]***
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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*

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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)

26. From a perusal of the record, it is apparent that the respondent was acquitted of the offence under Section 138 of the NI Act chiefly on the premise that on a juxtaposition of the financial status of both the parties, the respondent appeared to be more financially sound that the appellant.

27. The main thrust of the respondent's case before this Court also pertained to questioning the financial wherewithal of the appellant, and her capacity to advance the loan in question. It was contended that the respondent had been doing the business of Tours and Travels for the past 10 years, had paid income tax for the years 2013-2018, owned

two vehicles which were driven by the drivers. It was contended that for the same reason, it was rightly observed by the learned ASJ that the respondent was more economically sound in comparison to the appellant.

28. The Hon'ble Apex Court in the case of ***Tedhi Singh v. Narayan Dass Mahant*** **: (2022) 6 SCC 735**, in relation to the defence pertaining to the financial capacity of the complainant to advance a loan had observed as under:

> *"**10. … The proceedings under Section 138 of the NI Act is not a civil suit.** **<u>At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity</u>.** To that extent, the courts in our view were right in holding on those lines. **<u>However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents.</u> It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross-examination of the witnesses of the complainant.** Ultimately, it becomes the duty of the courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence."*

(emphasis supplied)

29. In line with the dictum of the Hon'ble Apex Court in ***Tedhi Singh v. Narayan Dass Mahant*** *(supra)*, the initial burden to demonstrate whether the complainant possessed the financial means to advance the loan in question does not rest upon the complainant but on

the accused unless a case is set up the accused in the reply to the statutory notice. The accused can however even subsequently question the financial wherewithal of the complainant either by producing independent materials like examining his witnesses or producing documents. The accused is also permitted to demonstrate the financial incapability of the complainant to advance the loan in question by pointing to the materials produced by the complainant or by cross-examination of the witnesses of the complainant.

30. In the present case, the learned ASJ, after considering the rival submissions made by the both the parties, noted that the respondent is more economically sound in comparison to the respondent. It was noted that the appellant only had 8 buffaloes, was not an income tax assessee, and her husband was an agricultural labourer. It was noted that the appellant could not prove any bank entry to show that she had withdrawn the said amount. It was further noted that appellant further failed to put it to the respondent on what date the loan was advanced.

31. In the opinion of this Court, however, since the issuance or the signatures on the subject cheque were not disputed, it was not on the appellant to establish her financial means to advance the said loan or cross-examine the respondent on the point of the purpose or date of advancement of the loan in question.

32. Once the execution and issuance of the cheque is not denied, the Courts ought to proceed on the presumption that the cheque was issued in discharge of a legally enforceable debt/liability. It is then entirely up to the respondent to raise a probable defence on a

preponderance of probabilities to show that there existed no debt/liability in the manner as pleaded by the complainant. Once the accused successfully raises a probable defence, only then does the burden shift upon the complainant, who then, has to show the existence of the debt as a matter of fact.

33. In the present case, except for the averments made by the respondent, no material is led to demonstrate that the appellant did not possess the financial wherewithal to advance the said loan in question. Even at the stage of cross-examination, no question is put to the appellant to indicate that she did not possess the financial means to advance the loan in question. For this reason, in the opinion of this Court, the burden never shifted upon the appellant to demonstrate that she possessed the means to advance the said loan.

34. Further, it is also the case of the respondent that it was infact he who had handed over the cheque to the complainant since she had approached the respondent seeking a loan. It is the respondent's own case that he had handed over the cheque to the complainant since she is the *bua* of her wife. It is further the case of the respondent that he handed over the cheque to the complainant on the condition that she would produce a guarantor for the loan amount, and since she failed to produce the guarantor, the respondent did not honour the cheque in question. However, in the opinion of this Court, the contention in itself *prima facie* appears to be implausible.

35. The respondent could simply not have issued the cheque to the appellant or could have deferred the issuance of the cheque until such

time till the appellant produced a guarantor. Conversely, the respondent could simply have issued stop payment instructions to the banker while mentioning that the loan was not to be honoured for the non-fulfilment of requisite conditions. The subject cheque, upon presentation, was dishonoured for the reason "*funds insufficient.*" It is highly peculiar why the respondent, in the first place, would issue a duly filled and signed cheque when he knew that the honouring of the subject cheque was condition subsequent to the appellant producing a guarantor.

36. In fact, it is also the respondent's own case that since the appellant did not produce any written document to manifest the existence of a loan agreement, the same casts a doubt in the story of the appellant. This argument, in the opinion of this Court, is paradoxical in nature. At one place, the respondent questions the veracity of the case of the appellant on the ground that she failed to produce any written agreement to substantiate the existence of any loan and in the same breath, the respondent himself fails to produce any written document/ agreement to show that he had advanced the duly executed cheque to the appellant as a loan subject to the appellant producing a guarantor.

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 24.07.2019, 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