



2024:DHC:7251



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:20.09.2024

+ **CRL.L.P. 648/2019**

ATUL PUNDHIR

..... Petitioner

versus

M/S THE DELHI GROUP & ANR.

..... Respondents

Advocates who appeared in this case:

For the Applicant : Mr. Akshit Sawal, Advocate (through VC)

For the Respondents : Mr. Ajay Chaudhary, Advocate (through VC)

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present leave to appeal is filed for setting aside the judgment dated 16.09.2019 (hereafter '**impugned judgment**') passed by the learned Metropolitan Magistrate ('**MM**'), South East, Saket, New Delhi in CC No. 617270/2016 whereby the respondents were acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**').



2. It is the petitioner's case that he had advanced a friendly loan for a sum of ₹48,00,000/- to Respondent No. 2 and accused Vishnu Partap Singh on behalf of Respondent No. 1. It is alleged that in order to repay the said loan, Respondent No. 2 and accused Vishnu Partap Singh, being partners of Respondent No. 1 issued two post-dated cheques on 04.04.2011 amounting to ₹24,00,000/- each, which on presentation, returned unpaid with the remarks "Insufficient Funds" *vide* return memo dated 04.04.2011. It is alleged that thereafter the petitioner sent a legal demand notice dated 16.04.2011. It is alleged that the payment was not made even within 15 days of the receipt of the demand notice, consequently a complaint under Section 138 of the NI Act was filed.

3. Respondent No. 2 in his statement under Section 313 of the Code of Criminal Procedure, 1973 ('CrPC') denied taking any loan from the petitioner. He stated that he was a partner at Respondent No. 1 alongwith the petitioner and 14 other people. He stated that he alongwith one Anil Aggarwal, and Harish Kumar Singh had given approximately ₹1.2 crores to the petitioner, who upon demand, sent a notice demanding ₹88 lakhs in order to falsely implicate Respondent No. 2. He stated that the petitioner and accused Vishnu Partap Singh (allegedly relative of the petitioner) in connivance with each other got one cheque book issued for the account of Respondent No. 1 firm without Respondent No.2's knowledge and forged his signatures thereupon. Respondent No. 2 further denied issuing the cheque and his signatures on the cheque.



4. The learned Trial Court by impugned order acquitted the respondents of the offence under Section 138 of the NI Act while noting that from the evidence on record as given by the petitioner, the documents exhibited in evidence, admission of Respondent No. 2, and his statement under Section 313 of the CrPC, the respondents never received any amount as loan from the petitioner. It was noted that the petitioner was not able to prove that the cheque in question was in discharge of a legally enforceable debt as on the date of the cheque. It was also noted that it did not stand established that Respondent No. 2 had drawn the said two cheques in question in favour of the petitioner, consequently noting that the ingredients of Section 138 of the NI Act were not satisfied.

5. The learned Trial Court, placing reliance upon the FSL Report, and placing it on record in terms of Section 293 of the CrPC, noted that the report of the expert supported the defence of Respondent No. 2 that he was not signatory to the cheques in question. It was noted that Respondent No. 2 had taken a consistent stand that the cheques in question were never signed and no amount as alleged was transferred.

6. The learned Trial Court noted that the petitioner had made an endeavour to prove the transfer of ₹5,00,000/-, and the same was proved to have been repaid *vide* debit entry dated 04.03.2010. It was noted that the said fact was not rebutted by the petitioner, and that he had not come out with an explanation as to why a payment of ₹5,00,000/- was made. It was noted that even if the fact of advancement of loan of ₹48,00,000/- is assumed to be correct, it being



proved that ₹5,00,000/- was repaid, the liability in any event would not be ₹48,00,000/-.

7. It was noted that in respect of the post-dated cheques, the petitioner was bound to prove debt as on the date appearing on the cheque. It was noted that Respondent No. 2 had taken a consistent stand that he did not avail the loan from the petitioner, and had discharged the presumptions against him on a preponderance of probabilities. It was further noted that the onus shifted on the petitioner who failed to prove any specific amount on date or mode of advancing loan to Respondent No. 2.

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

9. The learned counsel for the petitioner submitted that the finding of acquittal ought to be reversed as the same is only based on conjectures, and not cogent evidence. He submitted that the learned Trial Court erred in finding that the payment of ₹5,00,000/- *vide* debit entry dated 04.03.2010 as shown to be made by the respondents to the petitioner was towards the part payment of money due as covered by the cheques in question. He submitted that the said amount was never paid by the respondents. He submitted that the learned Trial Court did not take into account the fact that the said sum of ₹5,00,000/- was 'debited' from the petitioner's firm's account and not 'credited' to his account. He consequently submitted that the respondents never repaid ₹5,00,000/-.



10. He submitted that all the presumptions under Section 139 and 118(a) of the NI Act stood against the respondents and in favour of the petitioner. He submitted that the onus was not on the petitioner to show his source of income to establish his financial capacity to lend the money to the accused persons. He submitted that the presumption under Sections 118(a) and 139 of the NI Act could not have been rebutted by merely denying liability. He submitted that the respondents failed to produce material evidence to rebut the presumption that existed in the favour of the petitioner. He submitted that merely because there was no documentary record to manifest the terms and conditions in which the loan was advanced to the respondents to carry on their business, given their cordial relations, cannot be the ground to dismiss the case of the petitioner. He submitted that the respondents failed to produce any evidence to show that they had not taken any loan from the petitioner.

11. He submitted that during the cross examination, the petitioner demonstrated that he procured the amount given as loan through various sources. Some amount was withdrawn from the overdraft account of his firm namely M/S Tedeshwar Mahadev Cold Storage, while some amount was paid in cash. He submitted that an amount of ₹5,00,000/- was transferred through the petitioner's father account through RTGS to the respondent's account. He submitted that the learned Trial Court erred in dismissing the complaint merely because the petitioner could not recollect the exact date and time when the said loan was advanced.



12. He submitted that the learned Trial Court erred in relying solely upon the report sent by FSL without seeking any corroborating evidence. He submitted that the cheques in question were dishonoured on the ground “Funds insufficient” and not on the ground that “Signatures differ.” He submitted that there was a delay in obtaining the expert opinion on handwriting by FSL which creates great amount of suspicion on the veracity of the FSL report. He submitted that the learned Trial Court failed to examine the handwriting of the petitioner and sent the same to FSL for comparison with handwriting on the cheques in question. He submitted that while Respondent No. 2 denied his signatures on the cheque, he did not deny that the cheque was filled up by him, and the learned Trial Court failed to seek expert opinion regarding the handwriting details filled in the cheque.

13. The learned counsel for the respondents submitted that the petitioner failed to show that there existed any legally recoverable debt. He submitted that while the petitioner alleged that he had advanced a loan for a sum of ₹48,00,000/-, as per his own cross-examination dated 13.08.2014, he was unable to point to a date as to when he advanced the money. He submitted that as per the petitioner’s own stand he had not given any cash to the respondents, yet he failed to lead any documentary evidence to show the transaction through RTGS or cheque. He submitted that the only transaction of ₹5,00,000/- which was relied upon by the petitioner was done by the father of the petitioner and not the petitioner himself.



14. He submitted that the issued cheques in question merely bore the stamp of Respondent No. 1, a partnership firm, but did not bear the name of Respondent No. 2. He submitted that as per Section 138 of the NI Act, the cheque must have been drawn by the respondent. He submitted that Respondent No. 2 proved through documents from the bank that the cheques in question belonged to cheque book issued by Punjab National Bank to Vishnu Partap Singh and not to Respondent No. 2. He submitted that Vishnu Partap Singh in his examination himself admitted that he used to sign many papers of the firm whenever he was asked to do so by the petitioner. He submitted that the mere fact that the petitioner has not initiated any proceedings against Vishnu Partap Singh evidences their conspiracy.

15. He submitted that the objection of the petitioner with regard to the cheque return memo is unsustainable since it is a general rule that bank dishonours any cheque on the first instance of error in the sequence of errors. He submitted that the error “funds insufficient” is at serial number 1 and “signature differs” at serial number 10. He submitted that the legal notice by the petitioner was not replied to since the same was never served upon Respondent No. 2 and the same was maintained by him in his statement under Section 313 of the CrPC.

16. He submitted that Respondent No. 2 had filed an application for sending the documents to CFSL for expert opinion on 12.03.2013, and the petitioner had ample opportunities to file his objections against the inexplicable delay, veracity, and genuineness of the CFSL report,



competence, and reliability of expert, however, the petitioner himself chose to not do so. He submitted that the petitioner himself failed to prove the alleged advancement of the loan, an alleged legally recoverable debt, issuance of the cheque or even raise probable questions before the witnesses or objections with regard to CFSL report and its genuineness. He submitted that the learned Trial Court rightly acquitted the respondent, and prays that the present leave to appeal be dismissed.

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, reappraise 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. 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**].

20. 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”?

xxx

xxxxxx

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)

21. At the outset, the learned Trial Court, by impugned judgment, noted that the cheques in question belonged to the accused, they were also drawn on account maintained by accused which upon presentation got dishonoured, and despite the receipt of legal demand notices for which postal receipts were available on record, no payment was made within the statutory period.

22. On a perusal of the record, it is seen that right from the time of the framing of notice, the statement under Section 313 of the CrPC, and during the course of the trial, Respondent No. 2 denied issuing the cheque and his signatures on the cheque. It is seen that in order to buttress his claim, an application was moved by Respondent No. 2 seeking expert opinion for verification of the signature of Respondent No. 2 and comparison with those appearing on the impugned cheques. It is seen further that the application was allowed, and the original cheques were sent to CFSL for comparison with the admitted signature of Respondent No. 2 on account opening form, vakalatnama, and bail bond. The said report was placed on record in terms of Section 293 of the CrPC, and was read in evidence without examining the expert. At this point, it is pertinent to note that Respondent No. 2 had even moved an application before the learned Trial Court to either



consider the report in accordance with Section 293 of the CrPC or summon the expert in Court for proving the contents of the FSL Report.

23. It is seen that from the said FSL report, it transpired that Respondent No. 2 was not signatory to the impugned cheques. The learned Trial Court noted that the petitioner did not challenge the findings of the expert. From a perusal of the impugned judgment, it is apparent that Respondent No. 2 invariably maintained that he had not issued the impugned cheques, and that the same were not signed by him.

24. Conversely, while the petitioner endeavored to impute liability on Respondent No. 2 based on the presumption under Section 118(a) and 139, the learned Trial Court noted that Respondent No. 2 was able to dislodge the presumptions raised against him.

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 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]

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)

26. In the present case, as rightly noted by the learned Trial Court, Respondent No. 2 was able to controvert the presumptions raised against him under Sections 118(a) and 139 of the NI Act. It was noted that the FSL report substantiated the contention of Respondent No. 2 that he was not signatory to the impugned cheques. Furthermore, Respondent No. 2 was even able to raise a probable defence on a preponderance of probabilities that there existed no debt/liability in the manner pleaded by the petitioner. Respondent No. 2, in his defence evidence, relied upon the testimony of the petitioner to argue that despite the fact that the petitioner contended that a sum of ₹43,00,000/- was deposited in the account on various dates, no endeavour was made to prove the said accounts. Respondent No. 2 also disputed the testimony of Vishnu Pratap Singh, by highlighting that even though he claims that he was not a partner but merely an employee in the firm, Vishnu Pratap Singh still could not even depose the exact amount advanced by the petitioner to Respondent No. 1. Respondent No. 2, thus, submitted that his testimony should not be relied upon. In view of the aforesaid, the learned Trial Court rightly noted that Respondent No. 2 had taken a consistent stand that he had



not availed any loan from the petitioner, and was able to dislodge the presumptions raised against him.

27. It is pertinent to note that in terms of the dictum of the Hon'ble Apex Court in ***Rajesh Jain v. Ajay Singh (supra)***, once Respondent No. 2 was able to raise a probable defence by either leading direct or circumstantial evidence to show that there existed no debt/liability in the manner as pleaded in the complaint/ demand notice/ affidavit-evidence, the presumption raised against him disappeared. It was then for the petitioner to prove as a matter of fact that there in fact existed a debt/liability. In that regard the learned Trial Court noted that the cheques issued were post-dated, and the petitioner failed to show that there existed a debt on the date appearing on the cheque. It was noted that the petitioner had failed to place on record his bank statement to show his financial capacity. It was also noted that contrary to what the petitioner alleged, he had failed to prove any specific amount on date or the mode of advancement of the loan.

28. The learned Trial Court rightly noted that for a sum of ₹48,00,000/-, it is unnatural that such a sum would be advanced without any documentary proof. It was further noted that even when Respondent No. 2 stood in the witness box, no question or suggestion was led to indicate the receipt of the said loan from the petitioner. The learned Trial Court noted that there was no question as to when and where the amount of ₹48,00,000/- was handed over or any witness to testify that any such loan was advanced by the petitioner to the respondents. In the light of the aforesaid, the learned Trial Court



rightly noted that in the absence of any proof or documentary evidence, the petitioner had failed to show that the said loan for a sum of ₹48,00,000/- was advanced.

29. Much emphasis has been placed by the petitioner on the fact that the learned Trial Court erred in observing that a sum of ₹5,00,000/- had already been repaid *vide* debit entry dated 04.03.2010 when the same was debited and not credited to the petitioner's account. Upon a perusal of the impugned judgment, it is apparent that the learned Trial Court had merely made an observation that the petitioner had made an endeavor to prove the transfer of ₹5,00,000/- and the same was repaid *vide* debit entry dated 04.03.2010. It was further noted that apart from the said sum, no proof was led to establish that apart from ₹5,00,000/- there was any other advancement, albeit as per the petitioner's own stand the loan was advanced through bank transfer.

30. Even if the petitioner's case is taken at the highest, yet, since Respondent No. 2 had already raised a probable defence to dislodge the presumptions raised against him, the onus was still on the petitioner to show that there existed a debt/liability as on the date appearing on the impugned cheques. The rationale behind the order of acquittal in the present case was not based on the observation whether the sum of ₹5,00,000/- was repaid or not but the fact that the petitioner had failed to prove that there existed any debt/liability on date, or show the mode and manner of the advancement of loan, or lead any evidence/documentary proof so as to establish how the sum of



₹48,00,000/- was advanced. Respondent No. 2, already having dislodged his burden, it was on the petitioner to show the existence of the debt, that too, as a matter of fact. In fact, once Respondent No. 2 had raised a probable defence to the satisfaction of the Court, the presumptions under Sections 118(a) or 139 of the NI Act were no longer in the favour of the petitioner. For this reason, the petitioner having failed to lead evidence to show the existence of the debt/liability, his contentions that the learned Trial Court erred in observing that ₹5,00,000 was credited, or that the presumptions under Section 118 and 139 of the NI Act were in his favour, do not bolster the case of the petitioner.

31. 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.

32. 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.

33. The present leave petition is accordingly dismissed.

AMIT MAHAJAN, J

SEPTEMBER 20, 2024