$~26 to 30

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

\+ CRL.L.P. 119/2017

\+ CRL.L.P. 120/2017, CRL.M.A. 42465/2019

\+ CRL.L.P. 121/2017

\+ CRL.L.P. 122/2017, CRL.M.A. 42344/2019

\+ CRL.L.P. 123/2017

OM PRAKASH .....Petitioner

Through: Mr.Sanjib Dutta, Mr. Tarunakant Samantrari, Advs.

versus

SHAMSHER .....Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

% **03.07.2024**

1. The present appeal has been filed under section 378 of the Code of Criminal Procedure (hereinafter CrPC) seeking setting aside of impugned judgement and order dated 21.11.2016 passed by learned MM-North/Rohini, Delhi in case titled "*Om Prakash v. Shamsher*" filed under section 138 of the Negotiable Instruments Act, 1881 read with sections 418, 419, and 420 of Indian Penal Code,1860 wherein the learned M.M. dismissed the complaint of the Petitioner on account of the debt being not legally recoverable.

2. Brief facts of the case are that the parties are relatives and for the purpose of business expansion, the accused/respondent in the month of December 2005 requested for a friendly loan for an amount Rs.40,00,000/- from the complainant/petitioner, for a period of one year. The complainant/petitioner agreed to lend so, and handed over a cheque bearing no. 624341 dated 26.12.2005 for a sum of Rs. 40,00,000, drawn on Oriental Bank of Commerce Khera Khurd Delhi. On expiry of the period of one year, the accused/respondent did not return the loan amount and on request of the accused the time for payment was extended for another one year, still there was a default in payment.

3. That the accused/respondent again requested for an extension of time to repay the loan, till December 2010, due to financial scarcity. The complainant/petitioner agreed as the accused/respondent issued 5 post-dated cheques. Therefore, the details of the cheques in question are as under-

Cheque No.	**Amount**	**Cheque Dated**	**CC No.**
416488	5,00,000	12.10.2010	3288/2016
416487	5,00,000	18.08.2010	3371/2016
416486	10,00,000	28.06.2010	1297/2016
416490	8,00,000	08.04.2010	1832/2016
416489	10,00,000	09.12.2010	3026/2016

4. Later, on 08.03.2010 the accused/respondent paid a sum of Rs. 2,00,000/- in cash. Further, the above mentioned cheques drawn on Karnataka Bank ltd, Sector 14, Gurgaon were presented for encashment on different dates but the same was returned with remarks "funds insufficient" and a legal notice was issued to the respondent.

Cheque No.	**Return Memo Dated**	**S. 138 Notice Dated**
416488	5.04.2011	13.04.2011
416487	22.12.2010	31.12.2010
416486	12.10.2010	26.10.2010
416490	14.07.2010	22.07.2010
416489	10.05.2011	12.05.2011

5. Ld. counsel for the petitioner submits that the petitioner had advanced a loan to the respondent vide cheque dated 26.12.2005 drawn on Oriental Bank of Commerce. Further, he states that several opportunities were granted to the respondent to repay the same.
6. The counsel further submits that the respondent had issued an undated cheque amounting to Rs.40,00,000/- in favour of the appellant on 16.02.2008 as a security, thereby requested the petitioner not to present the said cheque as he is suffering from a huge financial crisis.
7. Thereafter, it is submitted by the learned counsel that the cheque amounting to Rs.40,00,000/- was taken back by the respondent and fresh, five post-dated cheques total amounting to Rs.38,00,000/- were

issued by the respondent. Subsequently, on 08.03.2010 the respondent paid a sum of Rs.2,00,000/- in cash, to the appellant.

8. It is further submitted by the counsel for the petitioner that all those five post-dated cheques were dishonoured and hence, a legal notice u/s 138 NI Act was issued upon the respondent. Despite the notice, the respondent made no payments. Hence, the appellant filed five complaint cases u/s 138 NI Act against the respondent.

9. The counsel for the petitioner submits that the issuance of cheques by the respondent is to be treated as an acknowledgment, with regards to the loan advanced to the respondent. The said cheque in question was duly filled up in respondent's own handwriting in the year of 2005 for the purpose of guarantee only to the Appellant and by this way he has admitted his liability towards the Appellant.

10. It is further submitted, even if it is a case of time barred debt liability, the Respondent has not denied his liability to repay the loan amount to the petitioner. In fact, it is a case of revalidation of the earlier undated cheque of Rs. 40,00,000/- which was taken back by the Respondent at the time of issuing the present cheques in question. And to buttress the contention, the petitioner has relied upon ***Veera Exports v. T. Kalavathy*** **2002 (1) 92** wherein the Supreme Court inter alia observed that there is no provision in the Negotiable Instruments Act or in any other law which stipulates that a drawer of a negotiable instrument cannot re-validate it. It is always open to a drawer to voluntarily revalidate a negotiable instrument, including a cheque.

11. Per Contra, the counsel for the respondent submits that even if all facts of the appellant are presumed to be true, the prosecution against

the respondent is liable to be dismissed as the petitioner has failed to prove that the amount mentioned in the cheque in question was legally recoverable on the date of issuance of cheque because the recovery of debt was barred by limitation. In support of the said contention, reliance has been placed upon ***M/S Vijay Polymrs Pvt Ltd V. M/S Vinay Agarwal 2009(2) JCC (NI) 143*** wherein this court has interalia held that a cheque issued for a time barred debt cannot be held to be a cheque issued for a legally enforceable debt as required u/s 138 NI Act.

12. I have heard the contentions of both parties and perused the record.

13. The Ld. MM. in the impugned order inter-alia held that a debt which is barred by limitation cannot be held to be a valid debt and a cheque issued for recovery of the same cannot be said to be a cheque issued for a legally recoverable debt. As the debt itself is not legally recoverable, one of the essential ingredients of section 138 of Negotiable Instruments Act has not been fulfilled in the present case.

14. In ***Prajan Kumar Jain*** **v.** ***Ravi Malhotra*****,** 2009 SCC OnLine Del 3368, it has been held that, an acknowledgment to be encompassed within the ambit of Section 18 of the Limitation Act has to be an acknowledgment in writing as also within the prescribed period of limitation. These are the twin requirements which have to be fulfilled in order to be a valid acknowledgment under Section 18 of the Limitation Act.

15. Moreover, the legal requirement with respect to section 138 is that a cheque must be drawn for the discharge, in whole or in part, of any debt or other liability which is legally enforceable. In the case of

Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel, (2023) 1 SCC 578 the Supreme Court inter alia held that, the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation. The term "legally enforceable debt" is defined in the Explanation to Section 138 of the Indian Negotiable Instruments Act. It refers to a debt or other liability that can be lawfully recovered through the due process of law.

16. Thus it is apparent on the face of the record that the essential condition to attract the provision of section 138 NI Act has not been made out. Reference in this regard be made to the judgement in the case of ***Indus Airways Private Limited v. Magnum Aviation Private Limited*** *(*2014) 12 SCC 539 wherein it was inter alia held that prosecution under Section 138 is only attracted when there exists a legally enforceable debt subsisting on the date of the cheque being drawn.

17. Though the appellate court has wide powers but it would be justified in interfering with the judgment of acquittal only when the judgment of the Trial Court is palpably wrong, ill-founded or misconceived, unsustainable or perverse. A leave to appeal can be granted only where the view taken by acquitting judge is clearly unreasonable, therefore this court should interfere with the decision of the trial court in very substantial and compelling reasons which has inter alia also been held in **Ghurey Lal v. State of Uttar Pradesh,** (2008) 10 SCC 450. The Apex Court has time and again clarified that the appellate court exercising its jurisdiction under the ambit of Section 378 would

be remiss in granting leave to appeal against an acquittal if the view taken in the impugned judgement can be termed as a possible one after conducting due analysis of the evidence. It is also a settled principle that the onus on the appellant is much higher before the Appellate Court as the presumption of innocence of the respondent in view of the acquittal is strengthened. Thereby, when two views are possible and if the appellate court has satisfied itself that the the one taken by the trial court is a plausible one, the leave may not be granted. Reliance in this regard can also be placed upon ***Jafarudheen and Others v. State of Kerala*** (2022) SCC Online SC 495 and ***Mohan alias Srinivas alias Seena alias Tailor Seena v. State of Karnataka,*** (2021) SCC OnLine SC 1233. The scope of inquiry that the Appellate Court undertakes under Section 378 is to check whether the impugned order/judgment has been recorded with an ignorance or exclusion of material facts or by placing emphasis on inadmissible evidence or wholly irrelevant considerations. If the trial court's order is found to be free from such infirmities, the leave to appeal cannot be allowed.

18. In the present case, it is evident that the judgment and order dated 21.11.2016 by Ld.MM has not taken into account any irrelevant, immaterial or inadmissible facts; rather the view taken is completely valid.

19. Hence, I am of the view that the present petition is liable to be dismissed and the view taken by the Ld.MM vide its judgement and order dated 21.11.2016 is upheld.

20.No leave is granted. Appeal is dismissed as there is no illegality and perversity in the impugned order.

DINESH KUMAR SHARMA, J

JULY 3, 2024
Pallavi/AJ/KR