



2024:DHC:6639



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

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Date of Decision: 12.08.2024

+ **CRL.L.P. 392/2024, CRL.M.A. 23769/2024, CRL.M.A. 23770/2024**

SHRI BHAGWAN YADAV

.....Petitioner

Through: Mr. Prateek Gupta and Mr. Raghav
Tiwari, Advocates

versus

ADARSH KHANDELWAL

.....Respondent

Through: Mr. Nitin Jain, Advocate

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of the present petition, the petitioner seeks leave to appeal against the judgement of acquittal dated 09.05.2024 passed by learned ASJ (FTSC)(RC), Dwarka Court, New Delhi in Criminal Appeal 190/2023 instituted under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as NI Act) titled as "Adarsh Khandelwal vs Bhagwan Yadav"

2. Facts, as stated in the complaint, are that in the complaint it has been claimed that the petitioner/complainant and respondent/accused were known to each other and had friendly relations. The petitioner gave an interest free friendly loan of Rs. 41 lacs to the respondent which he promised to pay within 3.5 years. In discharge of his liability, the respondent issued a cheque bearing no. 604888 dated 04.03.2019 drawn on Vijaya Bank for a sum of

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Rs.41 lakhs. Upon presentation, the said cheque got dishonoured and was returned vide return memo dated 06.03.2019 with the remarks "Funds Insufficient". Subsequently, a legal demand notice dated 03.04.2019 was issued to the respondent, and upon respondent's failure to repay the amount under the subject cheque, a complaint under Section 138 of NI Act came to be filed.

3. The learned Judicial Magistrate, after considering the evidence on record as well as the arguments advanced by the parties, passed the impugned judgement wherein it was noted that the respondent failed to prove his defence and case of petitioner stood proved beyond all reasonable doubts and hence, convicted respondent for the offence punishable under Section 138 NI Act.

Thereafter, an appeal was preferred by the respondent and vide order dated 09.05.2024 the learned Sessions Judge while reversing the findings of the Ld. Judicial Magistrate, acquitted the respondent.

4. Learned counsel for the petitioner submits that the impugned judgement has been passed without due consideration of the facts and circumstances. It is contended that there are several contradictions in the defence taken by the respondent, resulting in failure of the respondent to rebut the presumption under Sections 118 and 139 of the NI Act. In support of this he has placed reliance on the judgement of the Supreme Court in the case of P. Rasiya v. Abdul Nazer & Anr. reported as **2022 SCC OnLine SC 1131**. Further, while referring to Exhibit CW1/D-1, it is submitted that the petitioner has satisfactorily established the source of funds and duly produced the sale deed and deposed that he arranged the loan amount from the proceeds of the sale of the property of his wife.



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It is stated that the appellate court failed to consider that the respondent as per his defence in his application u/s 315 Cr.P.C., stated that the cheque was issued in 2016 while in cross-examination, he states that cheque was issued in 2017. Furthermore, there is also contradiction in the story of the respondent as to purpose of issuing the cheque.

Additionally, it is argued that the observation made by the learned Sessions Court in its impugned order that the petitioner/complainant is unable to tell when the loan was advanced is perverse and contrary to evidence on record as the petitioner categorically stated in his cross-examination that accused had taken a loan of Rs. 41 lacs in 2016 till 2018 in three parts i.e. Rs. 10 lacs, Rs. 20 lacs and Rs. 11 lacs. It is submitted that the findings arrived at by the Ld. Sessions Court are patently illegal, perverse and, therefore, need to be set aside. Lastly, it is contended that there was no violation of Section 269 SS of the Income Tax Act, 1961 ("the IT Act") and in this regard, reliance has been placed on the decision in **Criminal Appeal No. 764 of 2009** titled as Arti Rajesh Karangutkar v. Anna Rocky Fernandes and Anr.

5. Learned counsel for the respondent submits that the respondent in his statement under Section 313 Cr.P.C. denied having taken a loan of Rs.41 lakhs from the petitioner and stated that the subject cheque was given to the petitioner as a blank signed cheque as a Security or Bayana for the purchase of the property. It is stated that as per the petitioner the loan was disbursed between 2016 to 2018 and was to be paid in 3-3.5 years. It is then argued that no legally recoverable debt was due at the time of filing the complaint. Further, it is stated that the learned trial court failed to consider that the loan transaction has not been reflected in petitioner or his wife's income tax



returns. The amount was allegedly given in cash which attracts Section 269 SS of the Income Tax Act. In support, he places reliance on the decision of this court in the case of Aman Preet Kohli v. Pankaj Dayal reported as **2023 SCC OnLine Del 1808**. It is further argued that unaccounted cash cannot create a legally enforceable debt/liability and in this regard, has placed reliance on the decision in **Crl. L.P No. 231-233/2017** titled as Dilbagh Kaur Chandok Thr. v. State and Anr.

6. I have heard learned counsels for the parties and have also perused the material placed on record.

7. 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.]

8. In the impugned judgement, it has been noted that the respondent, both at Section 251 Cr.P.C. stage as well as in his statement under Section 313 Cr.P.C. has admitted that the subject cheque bear his signature. Further, the subject cheque have been drawn on the account maintained by the respondent. Considering these facts (alongside the other relevant considerations), the learned Judicial Magistrate noted that presumption under Section 139 read with Section 118 NI Act came into effect and that it was upon the respondent to rebut the same.

9. The respondent, in his defence, stated that he had not taken any loan and the aforesaid cheque was given as a Security or Bayana for the purchase of the property. In support of his contention the respondent relied on statement made under Section 313 Cr.P.C. Moreover, the petitioner has failed to bring on record any document to substantiate his contention that he advanced a loan of Rs.41 lakhs, which he stated that he had paid between the years 2016 to 2018 in three tranches of Rs.10 lakhs, Rs.20 lakhs and Rs.11 lakhs. Further, the petitioner, during his cross-examination admitted that he has not placed on record any document to show his financial capacity and has only relied upon the sale transaction of property belonging to his wife. Therefore, it has been contended that this only reflects the financial capacity of petitioner's wife and not the petitioner. Furthermore, to justify the source of loan, petitioner produced a page of bank statement pertaining

¹ (2013) 1 SCC 177

² (2015) 15 SCC 768

³ (2018) 13 SCC 663



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to his wife's account which reflects three withdrawal entries, all in the year 2015. Though, the account statement was neither formally filed nor exhibited, a perusal of same would show that the said bank statement is of year 2015, while it is claimed that the loan was given in three tranches between 2016 and 2018. There is no explanation as to why the substantial cash amount withdrawn in the year 2015 was kept and later disbursed after a year or two. Further, the wife of the petitioner, whose financial capacity was being relied upon, was never examined. Pertinently, the petitioner was unable to specify the exact date when the loan was advanced. Thus from above, this Court is of the opinion that the petitioner has failed to link the withdrawal of cash in the year 2015 with loan given later.

10. The learned Sessions Court also observed that during his cross-examination, the petitioner stated that he did not want to submit the documents as he had not included the current loan in his tax returns. The petitioner did not disclose a loan of Rs.41 lakhs in his tax returns, which was allegedly given entirely in cash, thereby directly violating Section 269SS of the Income Tax Act. As a result, it is argued that the provision of Section 138 NI Act cannot be resorted to for recovery of an unaccounted amount. Although the respondent was able to undermine the prosecution's version, it was observed that the financial capacity of the petitioner itself was in doubt and that his case did not hold water, when tested upon touchstone of standard of reasonable or prudent man. After noting the aforesaid, the Sessions Court held that the ingredients for the offence under Section 138 NI Act were not fulfilled and that the respondent had managed to rebut the presumption raised against him by showing that the case of the petitioner itself was improbable.



11. For reference, aforesaid provisions are extracted as under:

“118. Presumptions as to negotiable instruments —

Until the contrary is proved, the following presumptions shall be made:—

(a) of consideration:— that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

...

139. Presumption in favour of holder — *It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”*

12. The legal position as regards presumption raised under Section 139 read with Section 118 NI Act and its rebuttal 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:

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.

⁴ (2019) 5 SCC 418



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”

13. In light of the settled legal position and the entire factual situation as enumerated in the impugned judgement and reiterated hereinabove, this Court finds no illegality or infirmity in the judgement passed by the Sessions Court. The petitioner failed to substantiate his contentions relating to the grant of substantial sum of Rs.41 lacs as cash loan to the respondent and further that neither the petitioner nor his wife disclosed the alleged loan in their income tax returns inasmuch as the petitioner did not place on record his income tax returns. Also, the factum relating to the financial capacity of the petitioner, which weighed heavily upon the learned Sessions Court, also



holds a crucial position in the acquittal of the respondent, since the same made the case of the petitioner highly improbable.

14. Further, a decision of acquittal, strengthens the presumption of innocence in the favor 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.⁵ The principles guiding the Court in such situations have been succinctly delineated by the Supreme Court in Anwar Ali & Anr. v. State of Himachal Pradesh⁶ 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 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”

⁵ Jafarudheen & Ors. v. State of Kerala, (2022) 8 SCC 440,

⁶ (2020) 10 SCC 166



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

MANOJ KUMAR OHRI
(JUDGE)

AUGUST 12, 2024
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