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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : 11.07.2024

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CRL.L.P. 22/2024**SURENDER KUMAR**

.....Petitioner

Through: Mr. Divyanshu Nautiyal and Mr. Atul Barthwal, Advocates.

versus

URMILA

.....Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI****JUDGMENT (ORAL)**

1. By way of present petition/application, the petitioner seeks leave to appeal against the judgement of acquittal dated 01.11.2023 passed by learned MM, NI Act-02, Tis Hazari Court, Delhi in Complaint Case No. 517231/2016 instituted under Section 138 of the Negotiable Instrument Act, 1881 and titled as "Surender Kumar vs Urmila".

2. Facts, in a nutshell, are that the petitioner/complainant and his wife were known to the respondent/accused and that the respondent used to take financial assistance from petitioner's wife, which was duly returned. In January, 2012, the respondent approached petitioner's wife seeking a loan of Rs.10,00,000/- as the respondent wished to purchase a flat in Rohini, Delhi. Consequently, the petitioner forwarded an amount of Rs. 9,00,000/- as loan vide two instalments: Rs.5,00,000/- on 15.01.2012 and Rs.4,00,000/- on



29.01.2012. At the time of the latter payment, the respondent also signed certain documents and also provided a promissory note.

Thereafter, on one or another pretext, the respondent kept delaying the repayment but eventually on 07.07.2021, she issued 4 cheques (hereinafter 'subject cheques'). The subject cheques, when presented for encashment, were returned dishonoured with the remark 'funds insufficient'. A legal demand notice dated 07.09.2012 was issued to the respondent, and upon her failure to repay the amount under the subject cheques, the underlying complaint case came to be filed.

3. The learned MM, 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 accused had managed to rebut the presumption under Section 139 read with Section 118 NI Act, by showing that the petitioner's case was improbable from the standard of a reasonable man.

4. Learned counsel for the petitioner submits that the impugned judgement has been passed without due consideration of the facts and circumstances of the case. It is contended that the learned MM erred in drawing an adverse inference against the petitioner, by observing that he had failed to establish the source from which the said amount was obtained and failed to produce his Income Tax Returns (ITRs). Further, respondent's contention that the subject cheques were handed over to one Mr. Ramesh remained unsubstantiated inasmuch as the said Mr. Ramesh was not called as a witness to testify. Lastly, it is contended that the learned MM erred in shifting the burden of proof from the respondent/accused to the petitioner/complainant.

5. I have heard learned counsel for the petitioner and have also perused the material placed on record.



6. 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.]

7. In the impugned judgement, it has been noted that the respondent, both at Section 251 Cr.P.C. stage as well as in her statement under Sections 281/313 Cr.P.C. has admitted that the subject cheques bear her signature. Further, the subject cheques have been drawn on the account maintained by the respondent. Considering these facts (alongside the other relevant

¹ (2013) 1 SCC 177

² (2015) 15 SCC 768

³ (2018) 13 SCC 663



considerations), the learned MM 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.

The respondent, in her defence, stated that she had not taken any loan from the petitioner and that the aforesaid cheques had been handed over to one Ramesh, who statedly was to assist her in getting a flat in Rohini, and consequently, the said cheques were given as a blank cheques. In support of her contention, the respondent apart from relying upon the cross-examination of CW1 (the complaint/petitioner), also examined DW2 (who proved the entry in *roznamcha* w.r.t the police complaint filed by the respondent against the petitioner and Ramesh) and DW3 (who deposed that he was present at respondent's house when she had handed over the cheques to Ramesh). On the question of non-production of Ramesh as a witness, the respondent argued that since the filing of the police complaint, whereabouts of Ramesh were unknown.

8. At the same time, the learned MM also observed that the petitioner had deposed that his monthly income was about Rs.20,000/- to 25,000/- in 2012, when the alleged loan was given, and thus, it was unfathomable as to how he was able to provide such a huge amount of Rs.9,00,000/- as loan to the respondent. Although the petitioner was stated to be an income tax payee, however, he failed to bring on record any ITR which could support the factum of forwarding of such loan. While terming the conduct of the petitioner as illogical and irrational, 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.

9. After noting the aforesaid, the learned MM 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 her by showing that the case of the petitioner itself was improbable. Further, as regards the pro-note, it was observed that the same did not contain any details as to the parties or date, but only 4 signatures of the respondent and that in such a situation, the aforesaid document had no relevance in the eyes of law.

10. 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.

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.

⁴ (2019) 5 SCC 418



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”

11. 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 learned MM. While the petitioner had failed to substantiate his contentions relating to the grant of Rs.9,00,000/- as cash loan to the respondent and further the pro-note sought to be relied upon by the petitioner was also rightly found to be irrelevant, the respondent had duly rebutted the presumption raised against him. The respondent, while proving the factum of handing over of the subject cheques to *Ramesh*, had been able to prove its defence through the testimony of DW3-*Khilor Chandra* on ‘preponderance of probabilities’ and in the absence of the petitioner being able to provide any further evidence to substantiate his case, respondent No.2’s acquittal is justified. The factum relating to the financial capacity of the petitioner, which weighed heavily upon the learned MM, also holds a crucial position in the acquittal of the respondent, since the same made the case of the petitioner highly improbable.

12. 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 has been succinctly delineated by 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”

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

(MANOJ KUMAR OHRI)
JUDGE

JULY 11, 2024/rd

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

⁶ (2020) 10 SCC 166