



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

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Reserved on: 18.01.2024

Pronounced on: 29.02.2024

+ **CRL.L.P. 31/2024, CRL.M.A. 1240/2024, CRL.M.A. ____/2024**
(special leave to appeal) [To be numbered]

DHARAMVEER SINGH

..... Petitioner

Through: Mr. Mohit Yadav, Advocate.

versus

VIDYA SHREE DEVI

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

CRL.M.A.1241/2024 (delay in filing) & CRL.M.A.1242/2024 (delay in re-filing)

1. By way of present applications filed under Section 5 of the Limitation Act, the petitioner seeks condonation of delay of 54 days in filing and 13 days in re-filing the present petition.
2. It is stated that owing to the failure on part of the lower court counsel to take appropriate steps as well as the incorrect filing of a revision petition by the present counsel, there was a delay of 54 days in filing the said petition. Further, after the said filing, certain defects were marked and due to the non-availability of the petitioner/ his counsel, there was a delay of 13 days in re-filing of the petition.



3. Considering the aforesaid aspect, the applications are allowed and the delay in filing and refiling is condoned.

4. The applications are disposed of.

CRL.L.P.31/2024

1. By way of present petition filed under Section 378(4) Cr.P.C., the petitioner seek leave to appeal against the order of acquittal dated 31.07.2023 passed by the learned Principal District and Sessions Judge, South West District, Dwarka Courts, New Delhi in Crl. Appeal No.291/2022. The impugned order came to be passed in an appeal preferred by the respondent against the order of conviction passed by the learned MM in Ct. Case No.4993620/2016 arising out of proceedings under Section 138 NI Act.

2. Briefly, the facts as discernible from the material on record, are that the petitioner, who was the complainant, filed a complaint under Section 138 of NI Act in the year 2016. In the complaint, it was stated that the respondent/accused approached the petitioner with a proposal to construct a warehouse at his property in Village Dhulsiras, Delhi. Subsequently, an agreement was entered into wherein the respondent agreed to construct the same at the cost of Rs.25.20 lacs. It was further agreed that the respondent shall provide all the construction material. The petitioner and his brother transferred an amount of Rs.10 lacs and Rs.8 lacs respectively through RTGS on 09.05.2015 and 04.06.2015 respectively. However, the respondent failed to commence the construction work and further dumped some construction material on the site. The agreement was cancelled and the petitioner sought refund of the money. Consequently, the respondent issued a cheque bearing No.468245 dated 11.02.2016 for an amount of



Rs.6,54,000/- and orally agreed to repay the balance amount at a later stage. The said cheque when presented for encashment, was returned dishonoured with the remarks '*funds insufficient*'. A demand notice was issued whereafter, upon respondent's failure to make the payment under the cheque, the complaint came to be filed.

3. Upon conclusion of trial, learned MM convicted the respondent vide judgment dated 01.08.2022. Against the said judgement, an appeal was filed by the respondent wherein the impugned judgement/order came to be passed.

4. The petitioner's challenge to the impugned judgment is premised on the ground that the stand taken by the respondent that the cheque in question was stolen, was not adequately established in the trial, and as such, the presumption under Section 139 NI Act remained unrebutted. In support of his contentions, learned counsel for the petitioner has placed reliance on the decision of Supreme Court in M/s Laxmi Dychem v. State of Gujarat & Ors.¹

5. At the time of framing of notice, the respondent denied issuing the cheque as well as her signatures on the cheque. The said defence was maintained during her cross-examination as well as in her statement recorded under Section 313 Cr.P.C. The respondent claimed that the said cheque alongwith several other cheques was stolen by her employee. In this regard, she also examined her husband *Late Ravi Tiwari*, who also corroborated the respondent's story. Besides that, *Mr. Vikas Kumar Singh*, Senior Branch Manager at Vijaya Bank, Preet Vihar and *Mr. Manoj Kumar*, Branch Manager, Bank of Baroda, Preet Vihar were examined as DW-3 and

¹ (2012) 13 SCC 375



DW-4 respectively, who brought the account opening form and KYC documents of the respondent.

6. To rebut the presumption under Section 139 NI Act, the respondent sought directions to send the cheque to FSL for signatures and content analysis. The learned Trial Court permitted the same and resultantly, the cheque was sent to FSL. The FSL report opined that signatures on the cheque did not match with the sample signatures of the respondent. The petitioner however, neither contested the FSL report nor sought permission to cross examine the author of the report. Notably, the respondent had also called a bank witness to testify to the authenticity of her signatures on the account opening form. The petitioner however, did not cross examine the said witness despite opportunity being given. The learned Sessions Court, after noticing the above-mentioned facts, came to the conclusion that the respondent had taken a consistent stand and was able to rebut the statutory presumption. At the same time, it was observed that the petitioner had failed to prove the essential ingredients as required for the offence under Section 138 NI Act.

7. The factum of agreement/contract, supply of construction material and receiving of Rs.18 lacs were admitted by the respondent before the trial court. She further stated that against the payment received, she had supplied the requisite construction material.

Invariably, the prime contention raised before the trial as well as the sessions courts was that of non-issuance of the cheque in question. The respondent consistently maintained the stand that the said cheque was never issued by her, and that the same had been stolen by one of her employees. To buttress the said contention, the respondent had also filed an application



for sending the cheque to FSL for analysis. Upon analysis, it was concluded that the signature on the cheque did not match the specimen signature provided by the respondent.

8. Conversely, before the trial as well as the sessions court, the petitioner sought to impute liability based upon the presumption under Section 139 NI Act. Further, in order to rebut the assertion that the said cheque had been stolen and handed over to him, the petitioner argued that the respondent had failed to explain as to why an employee would misuse the cheque by giving it to the petitioner. Additionally, it was argued that even though an FIR was statedly registered, but no evidence of the same was brought on record. To counteract the argument that the cheque did not bear her signature, the respondent had contended that the cheque was dishonoured on account of 'funds insufficient' and not due to problems with the signature.

9. After a perusal of the entire record as well as the contention of the parties, I am of the considered opinion that no interference is called for to the decision made by the learned District & Sessions Judge. While it is true that Section 118(a) and 139 NI Act provide for a presumption in favour of the holder of a cheque, that the same was issued for discharge, in whole or in part, of any liability however, the same is a rebuttable presumption. The burden of proof to rebut the same is to the extent of '*preponderance of probabilities*'.

10. In the present matter, the respondent was able to rebut the presumption by way of her consistent stand alongwith the favourable FSL analysis. While it is true that mere assertions cannot take place of evidence and it is also true that an expert's opinion is not binding upon court of law however, the same cannot be completely disregarded. This holds especially



true when the opposite party has failed to create any doubt or loophole in the assertions as created upon the appreciation of the said assertions and expert evidence. It is only when sufficient reasons exist that a court would be duty-bound to reject the opinion rendered by an expert.

11. While presumptions of law indeed form a crucial part of the overall legal apparatus however, the same cannot be allowed to become the sole basis for conviction or favourable decision. Though in the present matter, the petitioner had led evidence leading to the invocation of the presumption under Section 139 NI Act in his favour however, the same stood rebutted by the respondent upon the presentment of her evidence, testimony of her husband and the FSL report. Once the same was rebutted, the onus once again shifted upon the petitioner to bring on record some evidence to show that the cheque was indeed issued by the respondent. However, the petitioner failed to do so. Not only was he unable to bring on record any evidence showing issuance of cheque by the respondent, but he also failed to counter the assertions and evidence presented by the respondent inasmuch as he failed to contest the FSL report and also opted not to cross-examine the author of the report or the bank witness called to testify as the authenticity of respondent's signature on the account opening form.

12. Petitioner's reliance upon the decision in Laxmi Dyechem (Supra) is also misplaced inasmuch in the said matter, the Court was faced with a situation wherein there had been a change in composition/signing authority of the company, resulting in dishonour of the cheque. However, in the case at hand, the situation relates to a dispute upon signature on the cheque and the same finding support from expert evidence. It is also not the case of the petitioner that the respondent had subsequently changed her signatures in the



authorisation documents to get a favourable FSL opinion. At the cost of repetition, it is noted that the petitioner had opted not to cross examine the bank witness examined by the respondent. The following observations of the Supreme Court seek mention here:-

“xxx

16.1... A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied.

16.2 There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer



despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.

xxx”

13. Further, a decision of acquittal, strengthens the presumption of innocence in favor of the accused. The appellate court, while considering a leave to appeal, has a duty to satisfy itself as to whether 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.² The principles guiding the Court in such situations has been succinctly delineated by Supreme Court in Anwar Ali & Anr. v. State of Himachal Pradesh³ as under:-

“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

² Jafarudheen & Ors. v. State of Kerala, (2022) 8 SCC 440,

³ (2020) 10 SCC 166



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”

14. Upon a conspectus of the facts and circumstances of the case as well as the legal position enumerated above, I find no ground to entertain the present petition. Consequently, the leave petition alongwith pending applications is dismissed.

**MANOJ KUMAR OHRI
(JUDGE)**

FEBRUARY 29, 2024/rd