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

+ **CRL.REV.P.(NI) 82/2024 and CRL.M.A. 37789/2024**

SUNITA MISHRA

.....Petitioner

Through: Mr. Achint Kumar with Mr. Shigra
Kumar, Advocates.

versus

KULDEEP RAI

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

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16.12.2024

CRL.M.A. 37788/2024

Exemption allowed, subject to just exceptions

The application stands disposed-of.

CRL.REV.P.(NI) 82/2024

By way of the present petition filed under sections 438 read with section 442 of the Bharatiya Nagarik Suraksha Sanhita 2023 ('BNSS'), the petitioner impugns judgment dated 30.11.2024 passed by the learned ASJ, Patiala House District Courts, New Delhi in Cr. Appeal No. 167/2023, whereby the learned Sessions Court has been pleased to set-aside judgment of conviction dated 27.03.2023 and sentencing order dated 28.03.2023 passed by the learned Metropolitan Magistrate, Patiala House District Courts, New Delhi in CC No. 88/20.

2. *Vide* judgment of conviction dated 27.03.2023, the learned Magistrate was pleased to convict the respondent for the offence under section 138 of the Negotiable Instruments Act, 1881 ('NI Act') and by



sentencing order dated 28.03.2023 the learned Magistrate has sentenced the respondent to simple imprisonment of 01 month alongwith fine of Rs. 4.3 lacs, to be paid as compensation to the complainant, with a default sentence of simple imprisonment for 03 months.

3. By way of the impugned order, the learned Sessions Court has remanded the matter back to the learned Magistrate, with a direction to record the statement of the respondent (accused) under section 313 read with section 281 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), in accordance with law and to decide the matter afresh. Furthermore, the learned Sessions Court has requested the learned Magistrate to complete the process within 03 months from the date fixed for recording the statement of the accused and defence evidence of the accused.
4. Mr. Achint Kumar, learned counsel for the petitioner submits, that the *substance* of all incriminating circumstances that had come-forth in the course of the trial have already been put to the respondent (accused); and that therefore the learned Sessions Court has erred in remanding the matter back to the learned Magistrate directing him to record the respondent's statement under section 313 Cr.P.C. and to thereafter decide the matter afresh.
5. However, from the record it is seen that the statement of the accused recorded on 06.02.2023 purportedly under section 313 read with section 281 of the Cr.P.C. reads as follows:

"All the incriminating evidence have been explained to the accused which are appearing in evidence against him to which he



has replied that yes, I have known the complainant, but from year 2015 onwards, I have no contact with her. The cheque bear (sic : bears) my signature. I had never given this cheque to the complainant. I have had no dealing with the complainant. The other details were filled up by someone by misusing it. I did not fill up the contents myself. The cheque had been misplaced by me. However, I have known husband of the complainant named Sh. Raj Kumar Mishra. My brother met with an accident in the (sic : year) 2010 and had spinal cord injury. Since 2012 I was handling business transaction for Ranga Cable network and in course of work I used to visit R. M. cable office. In 2015 my brother made an agreement with R M Cable network.

He stated that he wants to lead DE. Contents of the abovestatement have been read over and explained to the accused.”

(emphasis supplied)

6. Quite apart from the fact that the statement of the accused purportedly under section 313 Cr.P.C. has been recorded in the summary fashion as extracted above, the questions whether any cheque return memo had been proved on record; or whether a statutory notice under section 138 of the NI Act issued by the petitioner to the accused had been proved in the course of the trial, are conspicuously missing from the so-called “*All the incriminating evidence*” that the learned Magistrate says has been put to the accused.
7. In this backdrop, in the impugned order the learned Sessions Court has observed as follows :

“5. Section 313 Cr.P.C. incorporates the principles of audi alteram partem. Unless the entire incriminating evidence has been put to accused, the statement under Section 313 Cr.P.C. is incomplete. It is trite law that in absence of appropriate and effective statement under Section 313 Cr.P.C. by putting all incriminating evidences to accused, accused cannot be convicted, so



much so even if certain incriminating evidence has not been put to convict, it shall go to his benefit.”

(emphasis supplied)

8. In making the afore-noted observations, the learned Sessions Court has relied upon the decision of the Supreme Court in ***Raj Kumar vs. State (NCT of Delhi)***,¹ which enunciates the law to that effect.
9. It is the well settled position of law, that the dishonour of a cheque as evidenced by a cheque return memo; and, even more importantly, the issuance of a statutory notice under section 138 NI Act and its non-compliance by the drawer of the cheque form the foundations of the offence under section 138.
10. It appears however, that while recording the respondent’s statement purportedly in compliance of section 313 Cr.P.C., the learned Magistrate has completely omitted to put those vital incriminating circumstances, *if at all they had come-forth in the course of evidence*, to the accused, thereby vitiating the recording of statement under section 313 Cr.P.C., and consequently, the trial.
11. It is by reason of this crucial error in the trial proceedings, that the learned Sessions Court has remanded the matter to the learned Magistrate to record the statement of the accused-respondent under section 313 Cr.P.C. read with section 281 Cr.P.C. in accordance with law, and to decide the matter afresh.
12. In the circumstances, this court finds nothing remiss in the correctness, legality or propriety of the impugned order. The present

¹ 2023 SCC OnLine SC 609



revision petition is accordingly devoid of merit and is dismissed *in-limine*.

13. Pending applications, if any, stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

DECEMBER 16, 2024
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