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

\+ **CRL.REV.P.679/2012**

Reserved on: 29.09.2015
Date of decision: 06.10.2015

DEVENDER KUMAR ..... Petitioner

Through: Mr.Siddharth Pandit, Advocate.

versus

KHEM CHAND ..... Respondent

Through: Mr. Nem Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. The petitioner is aggrieved by the judgment and order passed in Criminal Appeal No. 60/2012 dated 12.09.2012 whereby the judgment and order of conviction dated 18.05.2012 and 23.05.2012 respectively passed by the Trial Court, convicting the respondent under Section 138 of the Negotiable Instruments Act (for short 'NI Act') and sentencing him to undergo Simple Imprisonment for five months and a fine of Rs.3 lacs, in default of payment of which one month SI, has been set aside and the respondent has been acquitted.

2. The petitioner, being friendly to the respondent, gave a loan of Rs.1.40 lacs to him vide an agreement executed on 16.09.2008

(Ex.CW1/A). The aforesaid agreement indicated that the petitioner would pay Rs.1.40 lacs on the next date i.e. a day after the agreement was executed and the respondent would return the amount of Rs.1.50 lacs on 23.04.2009. The agreement further indicated that the respondent had issued a promissory note admitting his liability and obligation to pay the aforesaid amount (Rs.1.50 lacs) to the petitioner on 23.04.2009. An affidavit was also sworn by the respondent which indicated that the respondent has given a cheque of Rs.1.50 lacs bearing cheque no.489019 payable on 23.04.2009. The cheque was of Syndicate Bank, Dev Nagar, Delhi. The promissory note has been exhibited as Ex.CW1/B and the affidavit referred above is exhibited as Ex.CW1/C. The cheque of Rs.1.50 lacs drawn by the respondent was dishonoured for insufficiency of funds. As a result thereof, a notice was issued to the respondent in which there was direction to pay the amount in question. Neither the amount was paid nor the notice was replied. Per force, a complaint had to be filed under Section 138 of the Negotiable Instruments Act.

3. The Trial Court proceeded with the complaint case in a summary manner and after summoning the respondent, his plea was recorded under Section 263 (g) of the Code of Criminal Procedure. The respondent though admitted the fact that he had signed the cheque but denied that the contents of the cheque were filled up by him. The respondent admitted that he had taken a loan of Rs.17,000/- from the petitioner on 16.09.2008. It was agreed upon between him and the petitioner that the loan amount would be returned in 17 equal monthly installments of Rs.1,000/- as

against the capital amount and in addition Rs.510/- as interest on the aforesaid amount, the rate of interest being 3% p.m. In lieu of the said amount, 5 blank cheques duly signed and certain other papers also signed by the respondent was given to the petitioner. There was an assurance from the petitioner that the documents and the blank cheques shall be returned to him when the installments of the loan were paid. Eight installments, of Rs.1,510/- each, were paid. Thereafter, a request was made to the petitioner to accept the balance amount and other blank cheques which were refused. The respondent also issued a legal notice on 14.07.2009 through his counsel. The aforesaid legal notice was duly replied. A case was filed by the respondent against the complainant in the concerned civil Court but the same was dismissed in default. In the meantime, the petitioner (complainant) had misused the blank cheques as also the papers which were signed by him and which were given to the petitioner before any loan could be advanced.

4. On the other hand, the petitioner (complainant) submitted, by way of affidavit, that the respondent had approached him in the month of August 2008 for financial aid for a limited period of 6-7 months for starting a new business venture. It has further been stated that on 15.09.2008, the respondent brought a stamp paper and a promissory note and requested for a friendly loan of Rs.1.50 lacs. However, the petitioner gave him only Rs.1.20 lacs. Thereafter, on persuasion of the respondent, Rs.1,000/- more was given in cash. This also did not satisfy the respondent and a cheque of Rs.2,000/- was issued in favour of the

respondent. A special request was made by the respondent to give him Rs.1.40 lacs and he promised to give Rs.1.50 lacs by post-dated cheques to the petitioner. On such repeated request, another cheque of Rs.17,000/- was signed in favour of the respondents on 16.09.2008. A promissory note was also executed by the respondent. In the month of April 2009, the petitioner reminded the respondent of his obligation to pay back the loan but the respondent took some time from him and requested for not presenting the post dated cheques given by him in the bank. The payment of money was delayed on different pretexts. Finally in the month of May 2009, the post-dated cheques given by the respondent was presented by the petitioner before Punjab National Bank, Dev Nagar, New Delhi, and the same was dishonoured for insufficiency of funds. The cheque has been exhibited as Ex.CW1/D whereas the cheque return memo dated 08.05.2009 is exhibited as Ex.CW1/E.

5. It has been stated by the petitioner that a further request was made by the respondent for presentation of the cheque after first week of April 2009. On the second presentation also, the cheque was dishonoured for the same reason i.e. insufficiency of funds. The cheque return memo dated 10.07.2009 is exhibited as Ex.CW1/F.

6. Thereafter, notice was issued which went unreplied and therefore, the complaint in question was lodged by him.

7. The Trial Court took note of the fact that respondent had initially taken a defence that the loan amount was of Rs.30,000/- but later the stand of the respondent was changed and it was stated by him that loan

was only of Rs.17,000/. Believing the agreement (Ex.CW1/A), promissory note-cum-receipt (Ex.CW1/B) and the affidavit of the respondent accepting the liability (Ex.CW1/C), the Trial Court was of the view that the mandatory presumption of law under Section 118 and 139 of the NI Act was available in favour of the petitioner.

8. The contention of the respondent that the columns of the cheques, promissory note-cum-receipt, agreement and affidavit were not filled in by him were not accepted.

9. The Trial Court also refused to accept the proposition of the respondent that despite the repayment of loan of Rs.17,000/-, the blank cheques and other documents were not returned to him as was promised by the petitioner. Hence, the Trial Court held that the respondent could not rebut the mandatory presumption of law which accrued in favour of the petitioner. The respondent was, therefore, convicted and sentenced as aforesaid.

10. The Appellate Court, on the other hand, took notice of the fact that the loan agreement (Ex.CW1/A) dated 16.09.2008 did not contain any acknowledgment of the disbursement of the loan amount of Rs.1.40 lacs. The agreement merely indicated that on the terms and conditions indicated, a friendly loan was agreed to be given to the respondents. The agreement further revealed that the respondents would be given Rs.1.40 lacs tomorrow, i.e. on the next day of the execution of the agreement. This meant that the agreement in question (Ex.CW1/A) was only an agreement to pay the amount in future. This could not have been an

evidence of payment of money on 16.09.2009, the day on which such agreement was executed. It was also marked by the Appellate Court that the agreement was not signed by any witness though a space had been earmarked for the signatures of the witnesses. The aforesaid agreement was on a plain paper instead of stamp paper of Rs.50/- which is the requirement of Article 5 (c), Schedule 1A of the Indian Stamp Act, 1899. The aforesaid document therefore, was not found to be believable or enforceable legally.

11. Once the payment was not found to have been made on execution of agreement, the execution of promissory note on the same day i.e. 16.09.2008 (Ex. CW1/B) also became operative only on the contingency of the loan having being advanced. The Appellate Court, therefore, was of the view that the agreement was executed without any actual transfer of money. The printed proforma which contained the signature and the thumb print of the respondent were filled up with two different inks.

12. The affidavit, Ex.CW1/C, has also been executed on 16.09.2008. Thus, in the absence of any proof of the amount of loan to have been paid, the promissory note and the agreement referred above lost all its efficacy and force. A promise for no consideration is a void agreement. (See illustration A, Section 25 of the Indian Contract Act).

13. The petitioner is admittedly an Income Tax Assessee but he has not shown the advance of loan to the respondent in his Income Tax Return (for short 'ITR'). The petitioner could not produce his ITR for the year 2008-2009 and no mention of the loan to the respondent in ITR for

the year 2009-2010, permits of drawing an adverse inference against the petitioner.

14. In order to appreciate the rival contentions of the parties, it is necessary to examine the Sections 118(a), 138 and 139 of the NI Act.

> ***Section 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;*
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> ***Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account***
> *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [1][a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--*
> *(a) the cheque has been 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;*

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [2][within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

Section 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.

15. For the application of provision of Section 138 of the NI Act, 3 ingredients are required to be satisfied, i.e.,

I. That there should be a legally enforceable debt;
II. That the cheque should have been drawn from the account of the bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt; and
III. That the cheques so issued is dishonoured for insufficiency of funds.

16. Under Section 139 of NI Act, unless the contrary is proved, the holder of the cheque shall be presumed to have received the cheque in discharge of any debt or liability.

17. Sub-clause (a) of Section 118 of the NI Act, inter-alia, provides that unless the contrary is proved, the drawn up negotiable instrument, if accepted, has to be presumed to be for consideration.

18. In Goa Plast (P) Ltd. vs. Chico Ursula D'souza & Anr., (2003) 3 SCC 232, the Supreme Court has held that that the provisions of section 138 to 142 of the NI Act, is for the purpose of giving credibility to negotiable instruments in business transactions. In view of section 139 of the NI Act, it had to be presumed that a cheque is always issued in discharge of any debt or other liability. The presumption could be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption.

19. In Krishna Janardhan Bhat vs. Dattatraya G. Hegde, (2008) 4 SCC 54, the Supreme Court had the occasion to deal with the aforesaid provisions of the Act. In the aforesaid decision, the Supreme Court took the view that Section 139 of the NI Act merely raises a presumption in regard to the cheque having been issued in discharge of any debt or liability but not the existence perse of a legally recoverable debt.

20. However, in Rangappa vs. Sri Mohan, (2010) 11 SCC 441, a three judge bench of the Supreme Court held that Section 139 of the NI Act includes the presumption regarding the existence of a legally enforceable debt or liability and that the holder of a cheque is also presumed to have received the same in discharge of such debt or liability. It was clarified in the aforesaid decision that the presumption of the existence of a legally enforceable debt or liability is, of course, rebuttable and it is open to the

accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. Without doubt, the initial presumption is in the favour of the complainant.

21. In Rangappa vs. Sri Mohan (Supra), section 139 of the NI Act is stated to be an example of a reverse onus clause which is in tune with the legislative intent of improving the credibility of negotiable instruments. Section 138 of the NI Act provides for speedy remedy in a criminal forum, in relation to dishonour of cheques. Nonetheless, the Supreme Court cautions that the offence under Section 138 of the NI Act is at best a regulatory offence and largely falls in the arena of a civil wrong and therefore the test of proportionality ought to guide the interpretation of the reverse onus clause. An accused may not be expected to discharge an unduly high standard of proof. A reverse onus clause requires the accused to raise a probable defence for creating doubt about the existence of a legally enforceable debt or liability for thwarting the prosecution. The standard of proof for doing so would necessarily be on the basis of "preponderance of probabilities" and not "beyond shadow of any doubt".

22. Keeping the above proposition of law in mind, on an analysis of fact, the scale of balance tills in favour of the respondent. The respondent appears to have rebutted the presumption under Section 139 of the NI Act, namely, the existence of a legally enforceable debt by establishing that no loan was advanced to him even though there was an agreement and a corresponding promissory note and an affidavit. The aforesaid loan was not shown in the ITR return of the petitioner. An adverse inference

could be drawn against the petitioner on that account. The loan amount also appears to be doubtful.

23. The petitioner could not, on the other hand, satisfy the requirement of law in discharging onus in the second instance regarding the plea of the respondent of no liability or non-existence of a legally enforceable debt. The advance of loan of such amount is required to be disclosed under the ITR return (referred to Section 269 SS of the Income Tax Rules and Section 271 D of the Income Tax Act.)

21. The respondent had sent a legal notice to the petitioner on 14.07.2009, regarding return of the blank signed cheques which were admittedly received by the petitioner. The petitioner has stated that he replied the notice on 28.07.2009. In the notice sent to the petitioner by the respondent on 14.07.2009, there is a clear and categorical plea that he had taken a loan of Rs.17,000/- only, to be payable in 17 installments of Rs.1,510/- each with an interest @ 3% p.m. However, such fact was not effectively denied nor there was any reference of the same in the reply of the said notice by the petitioner.

22. The Civil Suit lodged by the respondent seeking restraining orders against the petitioner from misusing the blank signed documents is also an evidence in favour of the respondent. The aforesaid suit was not pursued as it had become infructous on use of such blank cheques and a case having been lodged under Section 138 of the NI Act for the cheques having being dishonored on presentation before the bank.

23. The Trial Court had sentenced the respondent to undergo SI for a period of five months. The Appellate Court held that the sentence was also improper as under the provision of Section 262 of the Cr.P.C., in any trial under Chapter 21 of the Code which deals with summary trial, there could be no sentence exceeding three months.

24. The aforesaid interpretation of the Appellant Court is without substance. Though, Section 143 of the NI Act which was inserted vide Act 55 of 2002 (w.e.f. 06.02.2003), clarifies that all offences under the NI Act shall be tried by the Magistrate of the First Class or Metropolitan Magistrate and the provisions of Sections 262 to 265, both inclusive of the Cr.P.C., would, has as far as may be applicable to such trials; the proviso to the aforesaid section further delineates that in a summary trial also, it would be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding Rs.5000/- but this also was subject to certain conditions.

25. When at the commencement of, or in the course of a summary trial under the NI Act, it would appear to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is for any reason, undesirable to try the case summarily, the Magistrate would, after hearing the parties, record an order to the effect and thereafter recall any witness who may be examined and proceeded to here or re-hear the case in the manner provided by the Cr.P.C. Thus, the Appellate Courts interpretation was not correct as Section 143 permits sentencing of an accused, even though

tried in a summary manner, for an imprisonment for a term not exceeding one year.

26. After having said so, what has put this Court in dilemma is whether to entertain the aforesaid revision petition against the judgment and order of acquittal of the respondent. The present Criminal Revision, though has come to be entertained by this Court since 2012 but there is a lurking doubt about the maintainability of the present revision petition in view of the provisions of Sections 378(4) and 401(4) of the Cr.P.C.

27. Section 378 of the Cr.P.C. provides for appeals in case of acquittal.

"**Section 378. Appeal in case of acquittal.**

> *(1) Save as otherwise provided in sub- section (2) and subject to the provisions of sub- sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court [2] or an order of acquittal passed by the Court of Session in revision.]*
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> *(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal.*

(3) No appeal under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub- section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub-section (2)."

28. Sub-clause (4) of the aforesaid Section makes a provision of acquittal in case of a complaint. If a complainant applies before the High Court against an order of acquittal, on grant of special leave to appeal from such order of acquittal, an appeal may be preferred before the High Court.

29. Sub-sections (1) to (3) deal with the appeal by the State against acquittals. It is only sub-section (4) which deals with appeal against acquittal in a case instituted on complaint. In cases where such

complaints end in acquittal before the Trial Court, only appeal is permissible under sub-section (4) of Section 378 of the Cr.P.C., after the grant of leave to file such appeal by the High Court. There is some dispute about a situation when the Trial Court convicts an accused of a complaint case and on appeal by the accused before the Sessions Court, he is acquitted. In that event, whether a revision would lie against such order of acquittal or since it is an acquittal, though by the Appellate Court, the provision of Sec 378 sub-section (4) would apply. There is no direct indication in sub-section (4) of Sec 378 of Cr. P.C. that an appeal by the complainant could be made against an order of acquittal passed by the Trial Court only and not against an order of acquittal passed by the Appellate Court. In sub-section (1) and (2) of Section 378 of the Cr. PC, the State Government and the Central Government, as the case may be, have been given the discretion to direct the public prosecutor concerned to prefer an appeal as against an original or appellate order of acquittal passed by any Court other than the High Court. Thus, the aforesaid sub-sections indicate the scheme of the code and therefore sub-Section (4) of Section 378 of the Cr.P.C. in which also there is a use of phrase "such an order of acquittal", is covered by the same scheme. This permits the complaint to prefer straight away an appeal to the High Court. The aforesaid provision i.e. Section 378 of the Cr.P.C. has direct proximity to Section 378 (1) and (2). Under Section 378 (1) an appeal would lie only to the High Court not only from an original order of acquittal but also from the Appellate order of acquittal passed by the Courts below.

30. I am, therefore, of the opinion that Section 378 (4) of the Cr.P.C. would apply not only to an original order of acquittal in a case of complaint but also to an order of acquittal passed by the Sessions Court in appeal. There is nothing in Section 378 (4) of the Cr. P.C. to limit its application only to the order of acquittal passed in the first instance by the Trial Court.

31. In that event, a revision would not be maintainable against the Appellate order passed by the Sessions Court, before this Court.

32. In this context, Section 401 of the Cr.P.C. would be required to be analyzed.

"**Section 401. High Court's Powers of revisions.**

> *(1) In the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.*
> *(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.*
> *(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.*
> *(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.*

> *(5) Where under this Code tan appeal lies but an application for revision has been made to the High Court by any person and the High Court Is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.*"

33. Sub-Clause (4) of Section 401 of Cr.P.C. provides that when an appeal is provided for and no such appeal is filed, no proceeding by way of revision shall be entertained at the instance of the party, who could have appealed. Sub-clause 5, however, permits the High Court on its satisfaction about the interest of justice to treat the application of revision as petition of appeal and deal with the same accordingly.

34. There is, yet, another grey area. The question which disturbs this Court is whether to give benefit of sub-section (5) of Section 401 of the Cr.P.C. in the absence of any such leave to appeal having been granted. Any appeal against an order of acquittal is permissible only after the leave to appeal is accorded and not otherwise. Leaving this issue open, I am inclined to entertain the aforesaid revision as if it were an appeal after the grant of leave as mandated under Section 378(4) of the Cr.P.C.

35. This is for the twin reasons that the present revision petition has been entertained for a long time since 2012 and for the adherence to the principle of *apices juris non sunt jura* (legal principles must not be carried to their utmost extreme consequences, regardless of equity and good sense).

36. Thus, for the reasons afore recorded, viz. the successful rebuttal of the presumption under Section 139 of the NI Act of any legally enforceable debt, and the petitioner failing in discharging his onus, in the second instance, the petition is dismissed and the appellate judgment and order dated 12.09.2012, passed in Criminal Appeal No. 60/2012 is affirmed.

37. The respondent no. 2 stands acquitted.

ASHUTOSH KUMAR, J

OCTOBER 06, 2015
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