Lekh Raj Sharma Vs Yash Pal Gupta

Court: Delhi High Court

Date of Decision: June 30, 2015

Acts Referred: Criminal Procedure Code, 1973 (CrPC) - Section 251, 313, 378(4)
Negotiable Instruments Act, 1881 (NI) - Section 118(a), 138, 139

Citation: (2015) 6 AD 223 : (2015) 221 DLT 585

Hon'ble Judges: Vipin Sanghi, J

Bench: Single Bench

Advocate: S.C. Dhawan, for the Appellant; Sanjay R., S.B. Sharma, Advocates and Lovkesh Sawhney, APP, Advocates for the Respondent

Judgement

Vipin Sanghi, J.
The present leave petition has been preferred under Section 378(4) Cr.P.C. to seek leave to appeal against the judgment

dated 03.07.2014 passed by the learned Metropolitan Magistrate-04 Dwarka Courts, New Delhi in CC No. 1884/1/12 - a complaint filed by the

petitioner under Section 138 of the Negotiable Instruments Act (the NI Act) titled "Lekh Raj Sharma vs. Yashpal Gupta". By the impugned

judgment, the learned MM has acquitted the respondent/accused of the alleged offence. After hearing the learned counsel, the Court was inclined

to grant leave and with consent of learned counsel, heard their argument on the appeal and reserved judgment. Accordingly, the Registry is

directed to register and number the criminal appeal.

Crl. Appeal No. ...../2015

2. The case of the complainant-appellant, as narrated in the complaint, is that the complainant and accused have known each other for the last

about 40 years and have had close friendly relations with each other. The accused had a manufacturing unit and was carrying on the business in the

name of Yash Engineering, being a proprietary firm of the accused. The accused started facing some financial crisis in his business and the

complainant came forward to help him.

3. In the month of April, 2011, the accused urgently needed money and approached the complainant with a request to arrange Rs. 4 lacs, which he

promised to return after a few months. The complainant arranged the sum of Rs. 4 lacs and gave it to the accused. The accused returned the same

in the month of April, 2012. The accused again requested the complainant to arrange an amount of Rs. 4.50 lacs, for his business. The amount of

Rs. 4.50 lacs was given by the complainant to the accused, who executed a pronote dated 15.05.2012 and promised to pay interest @ 1.5% p.m.

The accused again approached the complainant in July, 2012 to arrange a further loan of Rs.4 lacs. Accordingly, the complainant arranged a loan

of Rs. 4 lacs from his sources. The accused executed a pronote dated 20.07.2012 after receiving the said amount and agreed to pay interest @

1.5% p.m. The accused even paid the interest, however, only till the month of August, 2012.

4. In the first week of September, 2012, the complainant requested the accused to return the entire amount given to him as it was required for the

marriage of his son in November, 2012. The accused could not arrange the amount immediately. However, he gave a post dated cheque of Rs.

8.50 lacs bearing no. 81582 dated 17.09.2012 drawn on Canara Bank, Rajouri Garden, New Delhi with an assurance of its encashment, as by

that time, he shall be able to arrange the funds in his account. When the cheque was to be presented on due date, the accused requested the

complainant not to present the same as he could not arrange the funds and requested the complainant to present the cheque in the first week of

November, 2012. On 07.11.2012, the complainant presented the cheque in his account maintained with Indian Overseas Bank, Dwarka. The said

cheque was returned on 12.11.2012 vide bank memo dated 09.11.2012 with the remarks ''insufficient funds''. The complainant approached the

accused and apprised him about the dishonoured cheque and requested him to immediately arrange the funds for his urgent needs. The accused,

however, returned only Rs. 50,000/- to the complainant.

Despite his promises, the accused failed to repay the entire loan to the complainant. On 15.11.2012, the complainant went to the residence of the

accused, but he avoided meeting the complainant. Thereafter, the complainant sent the demand notice dated 17.11.2012 through his advocate

demanding Rs. 8 lacs. The aforesaid notice was received by him, but neither any reply was sent, nor the money was repaid. Hence, the present

complaint was filed under Section 138 of the Act.

5. Pre-summoning evidence was led by the complainant and cognizance was taken against the accused vide order dated 19.12.2012. On the basis

of the prima facie material on record, notice under Section 251 Cr.P.C. was framed against the accused on 26.04.2013. The accused pleaded

not guilty"" and claimed trial. The accused moved an application to cross-examine the complainant i.e. Lekhraj Sharma (CW-1). The Complainant

(CW-1) was cross-examined and the complainants evidence closed. The statement of accused under Section 313 Cr.P.C. was recorded on

04.01.2014. The accused stated that although he used to borrow monies from the complainant, he borrowed small amounts. Further, he admitted

his signatures on the pronotes and the cheque. However, he stated that they had been misused by the complainant. He further stated that he had

given the cheque to the complainant as security in 2011, which the complainant did not return after the amount was repaid. The accused led the

evidence of his wife Smt. Seema, as DW-1. Thereafter, the defence evidence was closed. The learned Magistrate acquitted the respondent-

accused on the basis of his scrutiny and appreciation of the evidence by the accused.

6. The learned MM acquitted the accused by giving the following reasoning in the impugned judgment:

8. In this regard, the Court is in agreement with Ld. Counsel for complainant. By virtue of pronotes Ex. CW1/6 and Ex. CW1/7 and cheque Ex.

CW1/1, a presumption arises in favour of the complainant that the cheque in question was issued by the accused towards some legal liability.

However, during the cross-examination of complainant at the behest of the accused, he filed on record his ITR for the year 2013-14 along with

balance sheet as on 31.03.2013. The documents are Ex. CW1/4. In the present balance sheet, the complainant has not reflected the loan alleged

to have been advanced to the accused, though certain other loans and advances and on other deposit/ loan of one Mrs. Roopa Sharma are shown.

This creates a doubt in the veracity of the version of the complainant. Further the promissory notes Ex. CW1/6 and Ex. CW1/7 have been filled in

different handwriting and ink than the signatures of the accused. This also creates a doubt in the complainant"s story. In this regard, judgment titled

as Vipul Kumar Gupta Vs. Vipin Gupta, (2012) 8 AD 218 : (2012) 4 JCC 248 can be relied upon wherein on a similar question before Hon''ble

High Court, Hon''ble High Court upheld the order of acquittal passed by the trial court.

7. The first submission of learned counsel for the appellant is that the respondent claimed that a loan of Rs. 50,000/- was taken from the appellant

and repaid, but the cheque given as security was not returned. However, no such suggestion was put to the appellant in the cross examination by

the accused. Learned counsel submits that the respondent did not reply to the demand notice denying his liability. Learned counsel submits that the

balance sheet of the appellant, as on 31.03.2013, shows that an amount of Rs. 6.75 lacs was disbursed under the head ''Loans and advances''.

Thus, the amount borrowed by the respondent has been shown by the appellant. It is submitted that it was not incumbent for the appellant to

disclose the name of the borrower in the balance sheet. Finally, he submits that the respondent, in his statement recorded under Section 313

Cr.P.C., supports the case of the appellant that he had borrowed monies from the appellant.

8. On the other hand, learned counsel for the accused submits that the complainant, as CW-1, stated in his deposition that the pronote was signed

by the witnesses in his presence. However, those witnesses were not cited as witness before the learned trial court. Learned counsel submits that

the handwriting in the pronote is different from that of the accused. Learned counsel submits that the appellant in his cross examination stated that

the amount given as a loan was arranged from others. However, he has not disclosed the source from where the money was procured. Learned

counsel submits that the Balance sheet does not pertain to the whole amount. Further, the name of the accused has not been shown in the balance

sheet dated 31.03.2013 to indicate that any amount has been given as loan to the accused. Learned counsel for the respondent placed reliance on

the following judgments:

i. Vipul Kumar Gupta Vs. Vipin Gupta, (2012) 8 AD 218 : (2012) 4 JCC 248 .

ii. Satish Kumar Vs. State NCT of Delhi and Another, (2013) 8 AD 465 : (2013) 204 DLT 289 : (2013) 138 DRJ 93 : (2014) 1 RCR(Criminal)

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iii Vijay Vs. Laxman and Another, (2013) 5 AD 243 : (2013) 1 BC 743 : (2013) 113 CLA 347 : (2013) 2 CompLJ 107 : (2013) 2 JCC 103 :

(2013) 2 JT 562 : (2013) 1 RCR(Civil) 980 : (2013) 1 RCR(Criminal) 1028 : (2013) 2 SCALE 368 : (2013) 3 SCC 86 : (2014) 2 SCJ 134 :

(2013) 118 SCL 319 .

9. I have heard the learned counsel for the parties and perused the record.

10. It is settled law that it would not be open to this Court to set aside an acquittal unless the judgment of the acquittal under appeal appears to be

perverse, or based on misappreciation of the evidence. The Supreme Court, in Ghurey Lal Vs. State of U.P., (2008) 10 JT 324 : (2008) 10

SCALE 616 : (2008) 10 SCC 450 : (2008) 2 UJ 991 : (2008) AIRSCW 1487 , has held as follows:

73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if

it is going to overrule or otherwise disturb the trial court''s acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court''s acquittal if it has ""very substantial and compelling reasons"" for doing

so. A number of instances arise in which the appellate court would have ""very substantial and compelling reasons"" to discard the trial court''s

decision. ""Very substantial and compelling reasons"" exist when:

i) The trial court''s conclusion with regard to the facts is palpably wrong;

ii) The trial court''s decision was based on an erroneous view of law;

iii) The trial court''s judgment is likely to result in ""grave miscarriage of justice"";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court''s judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of

the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

11. Therefore, the impugned judgment has to be tested in the aforesaid light.

12. It is an admitted case that the signatures on the pronote dated 15.05.2012 (Ex. CW-1/6) and pronote dated 20.07.2012 (Ex. CW-1/7) are

those of the respondent. Further, the signature on the cheque dated 17.09.2012 (Ex. CW-1/1) has been admitted by the accused to be his own.

Thus, non-production of the witness by the complainant is not material.

13. It is also not in dispute that the respondent used to borrow money from the appellant on earlier occasions. The respondent in his statement

under Section 313 Cr.P.C. states as follows:

I had borrowed small amounts from comp. @ 10% p.a.

This is further substantiated from the cross-examination of Seema (DW-1). She states that ""My husband has taken a loan from the complainant

about 4-5 times.

The respondent had admitted his signatures on the cheque as well as the fact that he used to borrow loan from the complainant-appellant, and thus,

a presumption arose under Section 118(a) and 139 of the Act against the accused-respondent.

14. The accused-respondent did not lead any evidence of his own to show that the loan amount was not Rs. 5 lacs, but Rs. 50,000/-, which

already stood repaid by the accused-respondent to the complainant-appellant. The accused did not step into the witness box to stand by his

defence in this respect. He did not produce any documentary evidence in the form of an acknowledgment or receipt, nor claimed that one had

been issued by the complainant, to show that the entire loan amount had been repaid with the payment of the amount of Rs.50,000/-, and that the

said payment was in full and final settlement of the loan transactions. He produced his wife Seema (DW-1) as a witness in whose presence the

amount had been allegedly returned. Although, Seema (DW-1) in her examination in chief stated that the complainant had given a receipt regarding

the full and final payment, however, in her cross examination she stated that the written proof of the return of the amount has not been brought with

her. It does not stand to reason as to why the accused, or his witness DW-1 would not produce the receipt regarding the full and final settlement of

the loan, to establish that the loan amount was only to the extent of Rs. 50,000/- which was returned back to the complainant. The accused did not

explain the circumstances in which his pronotes Ex.CW-1/6 and Ex.CW-1/7 and the cheque in question CW-1/1 were not returned by the

appellant, and what steps he took to record the said factum, when they were not so returned. Pertinently, it was not even suggested to the

appellant CW-1 that he had withheld the two pronotes and the cheque in question and not returned the same by citing any reason.

15. Further, there is contradiction in the statements of the respondent and Seema (DW-1) qua the amount which was returned to the complainant.

The case of the accused-respondent before the trial court was that an amount of Rs. 50,000/- was borrowed from the complainant, which was

repaid. However, the wife of the accused, Seema (DW-1), in her examination in chief, inter alia, stated that ""My husband who is the accused in the

present case, has taken money from the complainant. I was told that an amount of Rs. 30,000/- in three equal installments of Rs. 10,000/- was

returned to the complainant by my husband. The said amount was paid in my presence"" (Emphasis supplied). The first part of this statement,

extracted in bold letters, is mere hearsay, and cannot be accepted. The later part of her quoted statement only shows that she was witness to the

act of return of some amount, but she was not personally aware of the actual amount returned. Thus, the testimony of DW-1 is unbelievable. The

accused, pertinently, did not himself appear as his witness when it is his case that the loan was taken by him, and returned by him. The accused

shied away from facing the cross-examination by the appellant - a factor which discredits his defence.

16. With regard to the source of the money, the appellant in his cross examination has stated that when the accused-respondent urgently needed

money, he had some money while the remaining amount was arranged from his friends Mr. Jitender Verma (Rs. 2 lacs.), Mr. Gupta (Rs. 2 lacs)

and Mr. Hooda (Rs. 2.5 lacs).

17. With regard to the plea of the respondent, that he had taken a loan of Rs. 50,000/- from the appellant and the cheque as well as the pronotes

were executed in blank at that time, and have been misused, I may take note of the following decision.

18. The Delhi High Court in The Jammu and Kashmir Bank vs. Abhishek Mittal, Crl. A. No. 294/2011 (Decided on 26.05.2011) held that:

The plea taken by the Respondent that the blank cheques had been given by him is of no consequence. Respondent has admitted his signatures on

the cheques. There is no law that a person drawing the cheque has to necessarily fill it up in his own handwriting. Respondent has not denied his

signatures on the cheques. Once he has admitted his signatures on the cheques he cannot escape his liability on the ground that the same has not

been filled in by him. When a blank cheque is signed and handed over, it means that the person signing it has given implied authority to the holder

of the cheque, to fill up the blank which he has left. A person issuing a blank cheque is supposed to understand the consequences of doing so. He

cannot escape his liability only on the ground that blank cheque had been issued by him.

(emphasis supplied)

19. Assuming, that the cheque had been handed over to the complainant- appellant in blank by the respondent, the purpose was to enable the

appellant to encash it, in the event that the loan was not repaid. Thus, the respondent gave an implied authority to the complainant-appellant to fill

up the cheque and encash it.

Similarly, once the pronote has been signed and executed by the respondent admittedly, it acts as an acknowledgment of the transaction. The

accused-respondent has not been able to produce any evidence in his support that the pronotes had been executed for a loan of only Rs. 50,000/-

. Further, two pronotes had been executed by the respondent, although his case is that one loan of Rs. 50,000/- had been taken from the

petitioner. No explanation has come forth from the respondent that why two pronotes had been executed in blank. When the other attending

circumstances do not probablise the defence that the loan amount was Rs.50,000/-, or that the entire loan had been repaid and fully and finally

settled, the fact that blank signed pronotes/cheque was delivered by the accused cannot be taken advantage of by the accused.

20. It is settled law that the burden to rebut the presumption under Section 139 NI Act is on the accused. The burden on the accused to rebut the

presumption is only to the extent of ""preponderance of possibilities"", whereas the complainant has to prove its case beyond reasonable doubt. It

has also repeatedly been observed that the accused can rely on the evidence brought on record by the complainant to rebut the presumption, and it

is not necessary that he has to lead separate/direct evidence. However, in the present case, the accused-respondent has not been able to rebut the

presumption of the cheque having been issued for consideration of the amount reflected in the cheque, in the face of the pronotes Ex.CW-1/6 and

Ex.CW-1/7

21. The finding that, as the amount of loan disbursed to the respondent was not shown in the balance sheet and ITR, the appellant could not be

said to have proved its case beyond reasonable doubt, is also erroneous. In this regard, reference may be placed on the decisions of the Bombay

High Court in:

i) Deelip Apte Vs. Nilesh P. Salgaonkar and Another, (2007) 1 BC 96 : (2006) 6 BomCR 653 , wherein the Court observed:

The learned J.M.F.C. has also held against the complainant the fact that the complainant had not shown the amount advanced by him in his

income tax returns. I do not think that every person who gives friendly loans does in all cases show such loans in their income tax returns more so if

they are payable on demand after short time. The learned acquitting J.M.F.C. entirely lost sight of the several presumptions which the law has

enacted in favour of the complainant.

(Emphasis Supplied)

ii) Krishna P. Morajkar Vs. Joe Ferrao and Another, (2013) 5 ABR 294 : (2013) ALLMR(Cri) 4129 : (2014) 2 BomCR(Cri) 738 : (2013) 4

RCR(Civil) 714 : (2013) 4 RCR(Criminal) 539 , wherein the Court observed:

The underlined observations do not disclose as to where can one find a prohibition on recovering amounts not disclosed in income tax returns.

With utmost humility, I have to state that I have not come across any provision of Income Tax Act, which makes an amount not shown in the

income tax returns unrecoverable. The entire scheme of the Income Tax Act is for ensuring that all amounts are accounted for. If some amounts are

not accounted for, the person would be visited with the penalty or at times even prosecution under the Income Tax Act, but it does not mean that

the borrower can refuse to pay the amount which he has borrowed simply, because there is some infraction of the provisions of the Income Tax

Act. Infraction of provisions of Income Tax Act would be a matter between the revenue and the defaulter and advantage thereof cannot be taken

by the borrower. In my humble view, to say that an amount not disclosed in the income tax returns becomes irrecoverable would itself defeat the

provisions of Section 138 of the Negotiable Instruments Act. Apart from the purpose of this Act, which has been outlined by the learned Single

Judge in Shri Deelip Apte (supra) as well as in Sanjay Mishra (supra), it ought to be seen that the moment a person seeks to recover through a

cheque an amount advanced in cash it gets amounted for in the system and the revenue authorities can keep a track of that and if necessary tax the

person. To brand an amount which is not shown in Income Tax Act as unaccounted money would be too farfetched and, therefore, I am in

respectful disagreement with the observations in Sanjay Mishra (supra), which in fact amounts to reading an additional requirement in Section 138

of the Negotiable Instruments Act, and legislating that such amounts becomes irrecoverable. At the cost of repetition, for saying that an amount not

disclosed in income tax returns cannot be legally recoverable liability, some provisions of law to that effect would have to be shown. Such

provision was not noticed by me and even the learned Counsel for the respondent could not show any such provision to me.

(Emphasis Supplied)

22. Similarly, in the present case, the loan given by the petitioner was a friendly loan for the business of the accused-respondent, in the background

that they had known each other for about 40 years. It was payable in a short period of time. Thus, I do not find any merit in the submission of the

respondent that since the name of the accused-respondent has not been shown in the balance sheet, or the amount had not been disclosed in the

ITR, it stands established that the loan was not disbursed by the appellant.

23. The decision in of Vijay (supra) does not advance the case of the respondent, as in the present case the complainant-appellant has produced

the two pronotes dated 15.05.2012 and 20.07.2012 to support the fact that the loan was disbursed by him to the accused-respondent. Even the

date when the loan was given by the appellant has been stated in the complaint.

24. Reliance on Vipul Kumar Gupta (supra) by the learned Trial Court is misplaced. In Vipul Kumar Gupta (supra), this Court had held as follows:

The reason given by the learned ACMM for coming to such a conclusion was that the appellant in his cross-examination has neither given the

date, month or the year when the loan was taken nor had he obtained any receipt from the respondent/accused. The amount of loan has neither

been reflected in the Income Tax Return (though he states that he is an Income Tax payee and files his Income Tax Returns regularly), nor has it

been reflected in the Books of Accounts. On the contrary, the cheque in question is signed by the respondent with a different ink and the

particulars regarding the date, name and the amount, which has been filled up in the cheque, is with a different ink. This has been considered by him

to be the sufficient reason to draw an inference regarding the probability of the genuineness of the defence of the respondent/accused and acquit

him.

The decision in Vipul Kumar Gupta (supra) is not applicable in the facts of the present case. In the present case, the appellant has stated that the

amount of loans were given to the respondent in the month of May, 2012 and July, 2012. Further, the pronotes executed between the appellant

and the respondent on 15.05.2012 (Ex. CW-1/6) and on 20.07.2012 (Ex. CW- 1/7) have been duly proved on record.

25. The decision in Satish Kumar (supra) relied upon by the respondent has no application in the facts of the present case. The complainant had

claimed that he had advanced a loan of Rs.72,000/- to respondent No. 2 and that respondent No. 2 had issued the cheque in question for the said

amount towards discharge of his liability. The said cheque had been dishonoured upon presentation. In response to the legal notice issued by the

complainant, respondent No. 2 had stated that the cheque in question had been stolen and that he had lodged a Police complaint and stopped

payment of the cheque. Thus, apart from the cheque in question there was no other evidence produced by the complainant to substantiate the

advancement of the loan. There was no acknowledgement of the alleged loan by the respondent accused. The Trial Court had convicted the

accused. However, the First Appellate Court has reversed the judgment and acquitted the accused on the premise that the complainant had failed

to prove the sources from where the alleged loan amount was arranged. This Court concurred with the judgment of acquittal passed by the First

Appellate Court. Paragraph 15 of the said judgment reads as follows:

15. It is in the aforesaid context that the learned ASJ had concluded that the petitioner/complainant had failed to prove his case against the

respondent No. 2 beyond reasonable doubt and therefore respondent No. 2 ought to have been acquitted for the offence under Section 138 of the

Negotiable Instruments Act. This Court is inclined to concur with the decision of the appellate court of overturning the judgment of the learned

MM. The said decision is based on a logical appreciation of the evidence placed on record. In fact, the learned trial court had erred in concluding

that the respondent No. 2 had not been able to discharge the initial onus placed upon him to show the existence of a reasonably probable defence

in his favour. On the contrary, the records summoned by the respondent No. 2 from his bank and the deposition of DW-2 (clerk from the Bank)

were themselves sufficient to hold that the respondent No. 2 had been able to raise a plausible defence and the notices issued by him to his banker

on 18.1.2002 and 3.2.2002 much prior to issuance of the demand notice issued by the petitioner on 26.3.2002, also substantiated the said

defence. However, once the burden of proof had shifted back to the petitioner/complainant, he was unable to prove his case beyond reasonable

doubt by establishing the source of the alleged friendly loan extended to the respondent No. 2, thus disentitling him to the grant of relief on the basis

of the negotiable instrument.

26. However, the facts of the present case are materially different from the fact situation in Satish Kumar (supra). Firstly, the respondent did not

even bother to respond to the legal notice and did not take the stand that the loan taken by him had been fully and finally settled with the repayment

of Rs.50,000/-, or that the appellant complainant had not returned the two pro- notes and the cheque in question while fully and finally accepting

payment from the respondent. He did not respond to the legal notice at all. Secondly, unlike in the case of Satish Kumar (supra), in the present

case, admittedly, the respondent accused had executed the pro-notes in question. Thus, there was no question of the factum of advancement of

loan being in any doubt. If the respondent/ accused desired to assail the correctness of the two pro- notes, it was for the respondent to lead

evidence in that regard. However, none was led on the said aspect. Thus, the decision in Satish Kumar (supra) has no application in the facts of the

present case.

27. The accused is obliged to set up a probable defence. The defence cannot be only a ""possible"" defence. It cannot be premised on the mere ipse

dixit of the accused. There should be some credible material or circumstance available on record which should lead the Court to conclude that the

defence/explanation for issuance of the dishonoured cheque is a probable one. For the reasons aforesaid, in my view, the findings and conclusions

drawn by the learned MM on facts is palpably wrong, and it is also based on an erroneous view of the law.

28. For the aforesaid reasons, the impugned judgment is set aside. The accused is convicted of the offence under Section 138 of the NI Act.