Lalit Batra Vs Akhil Ahlawat & Akhil ... vs Lalit Batra on 20 October, 2018

IN THE COURT OF SHRI PANKAJ GUPTA: ADDL. SESSIONS JUDGE
(FTC) (NORTH-WEST): ROHINI COURTS: DELHI

Crl. Appeal No. 75/17
Unique Case ID: DLNW01- 006307-2017

Lalit Batra
S/o Late Sh.B.L. Batra
R/o H.No.RP-43, Pitampura,
Delhi. .....Appellant

Vs

Akhil Ahlawat,
S/o Late Sh. Mahavir Singh,
R/o KU-46, Pitampura,
New Delhi. .....Respondent

Date of filing of appeal : 01.07.2017
Date on which judgment reserved : 20.10.2018
Date on which judgment pronounced : 20.10.2018

Crl. Appeal No. 50/18
Unique Case ID: DLNW01-002677-2018

Akhil Ahlawat,
S/o Late Sh. Mahaveer Singh,
R/o KU-46, Pitampura,
Delhi. .....Appellant

Vs

Lalit Batra
S/o Late Sh.B.L. Batra
R/o H.No.PD-111-B, Pitampura,
Delhi. .....Respondent

Date of filing of appeal : 15.03.2018
Date on which judgment reserved : 20.10.2018
Date on which judgment pronounced : 20.10.2018

JUDGMENT

1. Vide this common judgment, I shall decide the Crl. Appeal No. 75/17 and Crl. Appeal No.50/18.

2. In Crl. Appeal No. 75/17, the appellant preferred the appeal, being aggrieved by the judgment dated 08.05.2017 and order on sentence dated 27.05.2017 passed by Ld. Metropolitan Magistrate, North West, Rohini Courts, Delhi (the trial court) whereby the appellant was held guilty and convicted for the offence under section 138 Negotiable Instruments Act, 1881 (NI Act). Consequently, the appellant was sentenced for simple imprisonment till raising of the court and to pay fine of Rs. 1,00,000/- to be deposited with DLSA and in default, to undergo simple imprison- ment for three months. For the sake of convenience, the appellant and the respon- dent shall be referred herein as per their position before the trial court as the ac - cused and the complainant respectively.

3. In Crl. Appeal No.50/18, the complainant preferred the appeal, being ag- grieved by the order on sentence dated 27.05.2017 passed by the trial court.

4. This court takes up the Crl. Appeal No. 75/17 as the leading appeal.

5. In the present case, the complainant filed the complaint under section 138 NI Act stating that he and the accused had close friendly relation with each other. The accused represented him that he was in financial need to run his business of salt be- ing run in the name and style "Maa Durga Enterprises" and requested him to give him Rs. 2,95,000/- as friendly loan on 31.12.2009. He gave the said amount by way of loan to the accused. That time, the accused issued the cheque bearing no. 137137 dated 22.07.2010 drawn on Bank of Baroda, Maurya Enclave, New Delhi with an assurance of its encashment. When he presented the subject cheque in his account maintained with the Nainital Bank Ltd, Shalimar Bagh, Delhi, it was returned vide bank returning memo dated 26.07.2010 for the reason "Funds Insufficient ". Conse- quently, he got issued the legal notice dated 13.08.2010 demanding the said amount. Despite that, the accused neither replied the said notice or repaid the amount. Hence, he filed the complaint.

6. Before the trial court, the accused contested the complaint. After trial, the trial court held the accused guilty for the offence u/s 138 NI Act and sentenced him as mentioned above. Being aggrieved by the same, the appellant preferred the present appeal.

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7. Notice of the appeal was issued to the complainant. In response thereto, the complainant appeared and prayed for dismissal of the appeal.

8. I have heard counsel for the appellant/accused and counsel for the respondent/complainant and have perused the material available on record including the trial court record.

9. In nutshell, case of the complainant is that at the request of the accused, he gave him a friendly loan of Rs. 2,95,000/- in cash on 31.12.2009; to repay the said amount, the accused issued the cheque no. 137137 dated 22.07.2010 for Rs. 2,95,000/- drawn on Bank of Baroda, Maurya Enclave, New Delhi Ex.CW-1/1 (hereinafter referred to as the "subject cheque") to him with an assurance of its en- cashment; he presented the subject cheque in his account maintained with the Nainital Bank Ltd, Shalimar Bagh, Delhi for encashment, however, it was returned vide bank returning memo dated 26.07.2010 with the remark "Funds Insufficient"; consequently, he got issued the legal notice dated 13.08.2010 demanding the said amount; and despite that, the accused failed to repay the amount.

10. Before the trial court, the complainant proved the following documents:

(a) cheque no. 137137 dated 22.07.2010 for a sum of Rs. 2,95,000/- drawn on Bank of Baroda, Maurya Enclave, New Delhi Ex.CW-1/1;

(b) cheque returning memo dated 26.07.2010 Ex.CW-1/2;

(c) legal demand notice dated 13.08.2010 Ex.CW1/3;

(d) postal receipt Ex.CW1/4;

(e) Registered A.D. Ex.CW-1/5;

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(f) UPC receipt Ex.CW1/6; and

(g) courier receipt as Ex.CW1/7.

11. It is evident from the record that the subject cheque was presented by the complainant for encashment but the same was dishonored for the reasons "Fund In- sufficient". The accused has not disputed the said facts. Hence, it stands proved that the subject cheque was dishonored on presentation by the complainant for the reason "Fund Insufficient".

12. Counsel for the accused pleaded that the complainant mentioned the address of the accused as PD-111 B, Pitam Pura, Delhi-110034 in the legal notice Ex.CW1/3 as well as the complaint. However, the same is not the correct address of the complainant. As such, the accused has not received the legal notice Ex.CW1/3.

13. It is evident from the record that in the legal notice Ex.CW1/3 and the com- plaint, the address of the accused was mentioned as PD-111 B, Pitam Pura, Delhi- 110034. As per record, the said legal notice was sent on 13.08.2010 and the com- plaint was filed on 28.09.2010. Perusal of the order dated 03.11.2010 passed by the trial court reveals that the summons sent to the accused at that address received back with the report that brother of the accused had refused to accept the summons and consequently, the same was deemed to have been served. Consequently, the bailable warrant for a sum of Rs. 10,000/- was issued against the accused. Perusal of the order dated 22.03.2011 reveals that the said warrant was received back with the report that the accused had left the said premises. On 08.07.2011, the com- plainant sought time to file the fresh address of the accused. On 25.07.2012, the ac -

Page no. 5 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra cused appeared through counsel. As per the trial court record, after appearance be- fore the trial court, the accused had not questioned the order dated 03.11.2010 vide which he had been deemed to have been served. In fact, as the order sheets, neither the accused nor his counsel had ever disputed the address of the accused mentioned in the complaint and the said legal notice. Hence, it can be held that the accused had left the said address after filing of the complaint.

14. In cross examination, the complainant (CW-1) deposed that the address of the house of the accused was RP-43, Pitam Pura, Delhi; and after 2006, the accused had reconstructed his house. In his entire cross examination, no suggestion was given that the accused had no concern with the address PD-111 B, Pitam Pura, Delhi-110034 mentioned in the said legal notice and the complaint or that the said address had been wrongly mentioned by the complainant in those documents. Fur- ther, the complainant had only disputed the receipt of the legal notice, however, he had never stated that the said legal notice was not sent to the said address. No such suggestion was given to the complainant in his cross-examination. It is also not the case of the accused that the said address was not existing. Accused has also not led any evidence to prove that he had no concern with the said address at any point of time. In view of the foregoing discussion, it can be held that the date when the said legal notice was issued and the complaint was filed, the accused had connection with the said address and the legal notice dated 13.08.2010 was sent at the correct address.

15. Further, if the said submission of the accused is presumed to be correct for the sake of arguments only, then as held in the judgment "C.C. Alavi Haji v. Palapetty Muhammed & Anr., reported in

2007(2) JCC (NI) 225 as relied upon Page no. 6 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra by the trial court, the accused could within fifteen days of receipt of summons from the trial court for the said complaint make payment of the cheque amount and make submission to this effect before the Court and accordingly, the complaint would be rejected. But once no payment was made under the above circumstances, he cannot contend that there was no proper service of notice as required under Section 138 of the Act, by ignoring statutory presumption to the contrary under Section 27 of the General Clauses Act and section 114 of The Evidence Act. In view of the said inter- pretation, deemed service is to be accepted by the Court unless it is rebutted by leading cogent evidence.

16. Further, the trial court while dealing with the said plea, held as under:-

> "11. First, let us examine the issue of non-service of legal notice. During the trial accused has never challenged the correctness of his address. In such cases, sending of notice at the correct address is sufficient. It is not neces- sary that the notice must be received by the drawer of the cheque. The ac- cused challenged the fact of non-receipt of notice, however, he did not bring any cogent evidence showing non delivery of the same. The legal notice having been dispatched by Registered Post, there arose a presumption of due service as per Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1872 and now it was incumbent on the ac- cused to lead evidence to prove that the same was not served on him. No evidence has been led to rebut the presumption of deemed service. In such circumstances, the legal notice can be presumed to have been served."

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17. The accused has failed to show any infirmity in the said findings of the trial court. Hence, in view of the foregoing discussions, it can be held that the com- plainant issued the legal notice Ex.CW-1/3 in compliance of section 138 NIA.

18. Counsel for the accused pleaded that the accused had not issued the subject cheque. He denied the signature of the accused on the subject cheque and pleaded that the accused had not filled the contents of the said cheque. He also pleaded that the accused did not know as to how the subject cheque came in possession of the accused.

19. The accused in reply to the question no. 2 of his statement u/s 313 CrPC ad- mitted that the subject cheque pertains to his bank account. Hence, it stands proved that the subject cheque was drawn on the bank account maintained by the accused.

20. According to the complainant, he knew the accused who was running the business in the name and style of "Maa Durga Enterprises". In cross-examination of CW-1, one suggestion was given which he denied that he did not have any cordial relationship with the accused. However, no suggestion was given that he had no re- lationship with the complainant at all. Further, though, the

complainant has not filed any document to substantiate that the accused was running the business in the name and style "Maa Durga Enterprises" but in his cross examination, no suggestion was given to the complainant that the accused was not running any business under the said name or had no concern with the said enterprises. It implies that the com - plainant knew the accused who was running the business in the name and style "Maa Durga Enterprises".

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21. Admittedly, the subject cheque was dishonored for the reason "Fund Insuffi- cient" and not due to mismatch of the signature of the accused. In cross-examina- tion of CW1, no suggestion was given that it was the complainant who forged the signature of the accused on the subject cheque. Further, the accused has not led any evidence to prove that he ever protested with or lodged any complaint against his bank as to how it accepted the signature on the subject cheque as that of the ac- cused. Thus, it stands proved that the subject cheque bears the signature of the ac- cused.

22. As held above, the subject cheque was drawn on the bank account main- tained by the accused. The stand of the accused is that he did not know as to how the subject cheque came in possession of the accused. But he must be knowing as to whether he had issued the subject cheque to any person other than the com- plainant or in what manner, he had used the subject cheque. The accused has also not disclosed as to when he came to know that the subject cheque was not the part of his cheque book or when he came to know that the subject cheque had been mis- placed or stolen. Even in the entire cross-examination of CW-1, no question was put to him to that effect. The said facts must be within the special knowledge of the accused which he had failed to disclose and discharge his burden to that effect. Ac- cordingly, an adverse inference can be drawn against the accused. During the course of arguments, counsel for the accused pleaded that the subject cheque had been stolen and was misused by the complainant. However, no such plea was raised before the trial court nor any suggestion was given to the complainant.

23. Counsel for the accused pleaded that the accused had not disclosed the source of money from which he paid the loan to the accused. The complainant has Page no. 9 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra also not shown the said loan amount in his ITRs. Further, contents of the subject cheque were filled in different ink.

24. The complainant in his cross-examination specifically deposed that main source of his income was his agricultural land which was situated in his village. In his cross-examination, no suggestion to the contrary was given.

25. Further, the trial court while dealing with the said pleas held as under:

> "23. The accused in written arguments has stated that the complainant has failed to prove his financial capacity to give loan of Rs. 2,95,000/- to him. There is no merit in the submission as the complainant during his cross-examination has stated that

> although he is earning Rs. 10,000-15,000/- from his property dealing business, he is having agricultural land and agriculture is the main source of his income. With respect to contention of the counsel for the accused that the complainant has not shown the loan advanced in his Income Tax Return, following observation of the Hon'ble High Court of Delhi in case titled "Lekh Raj Sharma v. Yashpal Sharma, (Crl. L.P. 567/2014) are relevant.
>
> ".....21. The finding that, as the amount of loan disbursed to the respondent was not shown in the balance sheet and income tax return, the appellant Page no. 10 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra could not be said to have proved its case beyond reasonable doubt, is also erroneous....."

26. Thus, there is no merit in the submission of the ac-

cused that since the loan amount is not shown in the income tax return, it stands established that the loan was not given by the complainant. If the complainant has not shown the loan amount in his ITRs, the income tax authority may take the action against him. I am of the opinion that not showing the loan amount in the income tax returns is not sufficient to rebut the presumption under Section 139 of the Act.

It becomes pertinent to note here that though as per the judgment of Lekh Raj Sharma (supra), where the com-

plainant fails to show that the amount claimed by him under a case filed under Section 138 of the Act has also a parallel entry in the income tax returns, the onus on the complainant does not go undischarged. If, for instance, this court on the face of it believes that the fact that the complainant has not stated any entry in the ITR with respect to the amount claimed in the present case, despite this also, the paramount principle of criminal jurisprudence goes non negated i.e. the complainant needs to prove his case beyond reasonable doubt and if he is able to discharge the same burden even without establishing an entry of the claimed amount in the ITR, that does not fail to substantiate and establish his case. On this basis, as far as this point of discussion is concerned, Page no. 11 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra this court is of the considered opinion that just because com- plainant has failed to show an entry with respect to the amount claimed by him in his parallel ITR, this by no means go to establish that his claim is without any merit, when he has been able to prove the same through the evidence placed on record.

26. It is also argued on behalf of the accused that there is a change of ink in the cheque in question and the complainant has himself stated during his cross-examination that "the pen/ink on Ex.CW1/1 used in mentioning my name, amount in words, date and digits are different then the signature of the accused". There is no merit in the submission as the ac- cused neither in the application under Section 145(2) NI Act nor at the time of framing of notice has stated that the contents in the cheque in question were not filled by him. This notice has stated that the contents in the

cheque in question were not filled by him. This fact was agitated for the first time during recording of his statement under Section 313 Cr.PC. Thus, no adverse inference can be drawn on this ba- sis against the complainant."

26. Counsel for the accused has failed to show any infirmity in the above mentioned findings of the trial court. I also do not find any infirmity in the said findings of the trial court. Hence, it can be held that the accused has failed to prove that the complainant had stolen the said cheque and then misused the same. Further, the accused in cross-examination of CW-1 has nowhere suggested that he had not Page no. 12 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra filled the body of the subject cheque or the same had been forged by the complainant. He merely pointed out the different ink was used in the body of the said cheque. But the same in itself not sufficient to doubt the genuineness of the said cheque.

27. Now the question arises whether the said cheque was issued by the accused towards discharge of his debt and liability.

28. In the judgment titled as "Vijay v. Laxman", reported in (2013) 3 SCC 86, the Hon'ble Supreme Court held:

> "11. While dealing with the aforesaid two presumptions, the learned Judges of this Court in P. Venugopal v. Madan P. Sarathi [(2009) 1 SCC 492 : (2009) 1 SCC (Cri) 554] had been pleased to hold that under Sections 139, 118(a) and 138 of the NI Act existence of debt or other liabilities has to be proved in the first instance by the complainant but thereafter the burden of proving to the contrary shifts on the accused. Thus, the plea that the instrument/cheque had been obtained from its lawful owner or from any person in lawful custody thereof by means of an offence or fraud or had been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of disproving that the holder is a holder in due course lies upon him. Hence, this Court observed therein, that indisputably, the ini- tial burden was on the complainant but the presumption raised in favour of the holder of the cheque must be kept Page no. 13 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra confined to the matters covered thereby. Thereafter, the pre- sumption raised does not extend to the extent that the cheque was not issued for the discharge of any debt or liability which is not required to be proved by the complainant as this is essentially a question of fact and it is the defence which has to prove that the cheque was not issued towards dis- charge of a lawful debt."

29. While dealing with this issue, the trial court held:

> "16. Now the signature on the cheque in question is proved, the complainant is entitled to invoke presumptions under sec- tion 118(a) and Section 139 of the Act that the cheque was is- sued for discharging legally subsisting liability and that it was drawn for good consideration.

19. In the instant case, the accused had taken the defence that he did not borrow any amount from the complainant. It is also pointed out by the defence that the alleged money was given without any written agreement and this rules out possibility of any transaction at all. This court is of the opinion that absence of written agreement cannot lead the court to believe that the loan was not advanced, for, it is not a since qua non to prove existence of any transaction. For the court to believe such fact, the accused pleaded that the cheque in question does not bear his signature and that he does not know how it came in posses- sion of the complainant. However, the accused has also not led Page no. 14 of 18 (Common Judgment) Crl. Appeal Nos. 75/17 & 50/18 Lalit Batra Vs Akhil Ahlawat & Akhil Ahlawat Vs Lalit Batra any evidence to show that the cheque in question does not bear his signature. Even for the sake of arguments, if it is to be re- lied upon, it is not believable that a person whose cheque had been misused did not find it necessary to search it or to take le- gal measures to stop someone from misusing it. The accused can not merely state that he did not sign the cheque. He has to show that the cheque was stolen from his custody, the date he came to know of such theft and the steps he took to stop some- one from misusing it. Thus, in my opinion, the defence set up by the accused that he had not issued the cheque to the com- plainant is merely an ipsi dixit of the accused. Neither on a reading of the complaint, nor from the evidence led by the com- plainant and the cross examination of the complainant, the ac- cused has been able to create a reasonable doubt on the case of the complainant. No cogent evidence has been adduced by the accused to support his plea that he has not taken any loan from the complainant. The accused, to rebut the presumption under Section 139 read with Section 118 of the NI Act, has to set up at least a probable defence. The defence cannot be frivolous or moonshine. It cannot be merely a "possible" defence.

20. In the present case, the accused did not step into the witness box to stand by his defence in this respect. Thus, the bald plea of the accused having not been substantiated by any cogent, convincing and clear evidence would not be sufficient to rebut the presumption of law."

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30. Counsel for the accused has failed to show any infirmity in the said findings of the trial court. In view of the foregoing discussions, I also do not find any infirmity in the said findings of the trial court. As such, the complainant has proved the essential ingredients of section 138 NI Act. Hence, the presumption lies in favour of the complainant that the accused has issued the subject cheque in favour of the complainant to discharge his debt and liability. On the other hand, the accused has failed to rebut the said presumption. Hence, it can be held that the accused has issued the cheque Ex.CW1/A in favour of the complainant in discharge of his loan liability and for consideration.

31. In view of the foregoing discussions, it can be held that the judgments relied upon by counsel for the accused are distinguishable on facts of the present case and are of no benefit to the accused.

32. Therefore, it can be held that the complainant/respondent proved the essential ingredients of section 138 NI Act beyond reasonable doubt against the accused. As such, I do not find any infirmity in the judgment dated 08.05.2017 passed by the trial court.

33. Counsel for the complainant pleaded that the sentence awarded by the trial court is highly inadequate and against the object of the NI Act. Hence, he prays that the sentence may kindly be enhanced.

34. On the contrary, counsel for the accused opposed the said prayer of the com- plainant.

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35. As held above, it stands proved that the complainant, at the request of the ac- cused, gave a friendly loan of Rs. 2,95,000/- in cash to him on 31.12.2009 and to re- pay the said amount, the accused issued the subject cheque but the same was dis- honoured for the reason "Funds Insufficient". Consequently, the complainant got is- sued the legal notice dated 13.08.2010 demanding the said amount; and despite that, the accused failed to repay the amount. It is also proved that the accused issued the subject cheque towards discharge of his debt and liabilities. Hence, the complainant becomes entitled to the cheque amount which the accused failed to pay without any justification. Further, the accused is also to be penalised for the offence committed by him.

36. Vide the order on sentence, the trial court held that the cheque bouncing cases are on high rise. Despite that the trial court has not given any plausible rea - sons as to why the accused was sentenced for simple imprisonment till rising of the court and fined for an amount much lesser than the cheque amount. The trial court has also failed to give any reason as to why no amount was awarded to the com- plainant as compensation. On perusal of record, it appears that the trial court got in- fluenced by the fact that the complainant had stopped appearing before it at the final stage. However, it is not a ground to absolve the accused from his liability. The trial court also got influenced by the bald plea made by counsel for the accused that the accused was earning Rs. 15,000/- per month only. The said bald plea is also not sufficient to pass such an order. The matter pertains to the year 2010 and relates to the loan transaction between the parties. Therefore, I am of the opinion that the sentence awarded by the trial court is highly inadequate in nature and is liable to be enhanced. Hence, the order on sentence dated 27.05.2017 deserves to be modified.

37. Therefore, the Crl. Appeal no. 75/17 preferred by the appellant is dismissed.

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38. Crl. Appeal no. 50/18 preferred by the respondent/complainant is allowed. Order on sentence dated 27.05.2017 is modified and the appellant/convict is sentenced to undergo simple

imprisonment for a period of 04 months and to pay fine of Rs. 5,90,000/- i.e. the fine twice the cheque amount for the offence u/s 138 NI Act; in default of payment of fine, to undergo further Simple Imprisonment for a period of 02 months. Once the fine is deposited, out of that Rs. 4,00,000/- be paid to the respondent/complainant as compensation and Rs. 1,00,000/- be deposited with DLSA (North-West) Rohini Courts, Delhi. TCR be sent back to the trial court along with copy of this judgment. Signed copy of the judgment be placed in the Crl. Appeal no.50/18 titled as "Akhil Ahlawat Vs Lalit Batra". Copy of the judgment be delivered to the appellant/convict free of cost.

39. Appeal file be consigned to record room.

PANKAJ GUPTA

Announced in the open court GUPTA 2018.10.20 16:14:38 +0530

on this 20th day of October, 2018. (Pankaj Gupta)
ASJ(FTC): N-W: Rohini Courts :Delhi