



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

% *Reserved on: December 11, 2023*
Pronounced on: December 18, 2023

+ **CRL.L.P. 104/2022**

ADARSH GAUR **Petitioner**

Through: Mr. Ramnish Khanna and Mr. Sahil
 Dagar, Advocates

Versus

STATE OF NCT OF DELHI & ANR. **Respondents**

Through: Mr. Ajay Vikram Singh, APP for
 the State
 Ms. Shabnam Sheikh, Advocate for
 R-2.

CORAM:
HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

1. The present leave petition has been filed under Section 378(4) of the Code of Criminal Procedure, 1973 [*CrPC*] seeking leave to file an appeal against the impugned order dated 04.01.2022 passed by the learned MM-04/NI Act/South, Saket Courts, New Delhi.

2. In view of the submissions made and considering the averments made in the petition, this Court is of the *prima facie* view that the petitioner (hereinafter referred to as **appellant**) has made out a case for grant of leave to appeal.

3. Accordingly, leave is granted and the Registry is directed to give a 'Number' to this petition as an appeal.



CRL.A...../2023 (TO BE NUMBERED)

4. The present appeal has been filed by the appellant seeking setting aside of the order dated 04.01.2022 passed by the learned MM-04/NI Act/South, Saket Courts, New Delhi [*learned Trial Court*] in criminal complaint being CT No.12629/2017 titled *Adarsh Gaur vs. Metenuo Kechu*, whereby the respondent no.2 has been acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 [*NI Act*].

5. As per the facts involved, respondent no.2, being the proprietor of M/s Element Oxygen, entered into a Lease Deed dated 10.06.2016 with the appellant for property D-38, Ground Floor, Saket, New Delhi-110017 for a period of 11 months from 10.06.2016 to 09.05.2017 and was to pay a fixed rent of Rs.75,000/- per month, excluding the electricity, water, cable television and kitchen gas charges. Thus, the respondent no.2 handed over 11 post dated cheques for an amount of Rs.67,500/- each to the appellant for rent (after deduction of TDS) along with the cheque bearing no.166637 dated 25.06.2017 for an amount of Rs.80,500/- drawn on Axis Bank, Khan Market, Delhi for the other charges.

6. The respondent no.2 defaulted in payment of rent for the months of April and May, 2017 as also the additional charges including electricity, water etc. Despite expiry of the tenancy, the respondent no.2 failed to clear the dues, resulting in the appellant presenting the cheque bearing no.166637 dated 25.06.2017 for an amount of Rs.80,500/- drawn on Axis Bank, Khan Market, Delhi for encashment. The said cheque was dishonoured vide return memo dated 29.06.2017 for the reasons '*Insufficient Funds*'. The appellant thereafter sent a Legal Notice dated 01.07.2017 to the respondent no.2 for clearance. Upon receipt thereof, the



respondent no.2 approached the appellant assuring her that all the dues shall be cleared. Since the respondent no.2 failed to make the payments again, the appellant again presented cheque bearing no.166637 dated 25.06.2017 for an amount of Rs.80,500/- drawn on Axis Bank, Khan Market, Delhi for encashment, which was again dishonoured for the reason '*Insufficient Funds*', vide return memo dated 10.08.2017. The appellant sent another Legal Notice dated 08.09.2017 which was allegedly delivered to the respondent no.2 on 11.09.2017 calling upon the respondent no.2 to make the payment of the dishonoured cheques. The failure of the respondent no.2 to make the necessary payments resulted in filing of the present complaint under Section 138 of the NI Act on 24.10.2017.

7. The learned Trial Court, relying upon ***MSR Leathers v. S. Palaniappan and Anr.*** (2013) 1 SCC 177, wherein it is held that prosecution based upon second or successive dishonour of cheque is permissible, if it satisfies the requirements stipulated in the Proviso to Section 138 of the NI Act, took cognizance of the offence punishable under Section 138 of the NI Act and summoned the respondent no.2 vide order dated 16.01.2018. Notice under Section 251 CrPC was framed against the respondent no.2 vide order dated 04.07.2018 wherein the respondent no.2 pleaded that the cheque in question was given as security for the electricity charges and that a security amount of Rs.1,50,000/- paid to the appellant at the time of renting the property remains unaccounted for. It was further stated that though the cheque was filled by her and bears her signature, she did not receive the Legal Notice dated 08.09.2017 and had no liability towards the appellant. The application filed by the



respondent no.2 under Section 145(2) of the NI Act was allowed vide order dated 12.09.2018 and the appellant was directed to be cross-examined. The statement of the respondent no.2 under Section 313 CrPC was also recorded. The right of the respondent no.2 to lead DE was closed vide order dated 02.12.2019 and the matter was fixed for final arguments. The right of the respondent no.2 to address oral arguments was closed vide order dated 19.02.2020 with liberty to filed written arguments.

8. Vide the impugned order dated 04.01.2022, the learned Trial Court acquitted the respondent no.2 of the offence under Section 138 of the NI Act, holding that as regards the first Legal Notice dated 01.07.2017, since it did not raise any demand for the amount of the dishonoured cheque and thus did not fulfil the requirements of Section 138, the compliant could not sustain qua the said Legal Notice. As regards the second Legal Notice dated 08.09.2017, the learned Trial Court held that the said notice was not received by the respondent no.2, and the appellant had been unable to prove by leading cogent evidence that the said Legal Notice was duly received by the respondent no.2 on 11.09.2017, as the tracking report could not be read in evidence due to lack of the supporting certificate as per Section 65B of the Indian Evidence Act, 1872, and as the appellant was unable to explain the discrepancy regarding the two dates of 09.09.2017 and 10.11.2017 mentioned on the hand written postal receipts, which was crucial for sustaining the compliant, the appellant had failed to discharge the burden of proving the essential ingredients of the offence under Section 138 of the NI Act.

9. Learned counsel for the appellant submitted that the impugned order is liable to be set aside as the same was passed by the learned Trial Court



without appreciating the order dated 16.01.2018 whereby the learned predecessor, after perusing the complaint and the pre-summoning evidence, had held the complaint to be within limitation as the complaint was based upon the second Legal Notice dated 08.09.2017 and further observed that the Legal Notice dated 08.09.2017 was issued and served upon the respondent no.2 in the ordinary course.

10. Learned counsel for the appellant further submitted that the learned Trial Court has erred in passing the impugned order as it has ignored the admissions made by the respondent no.2 in her statement under Section 313 CrPC and also in response to the notice under Section 251 CrPC where she has categorically admitted that she had to pay the appellant the cheque amount and that the cheque in question was filled and signed by her. He thus submits that all the concerned ingredients under Section 138 of the NI Act were made out against the respondent no.2.

11. Learned counsel for the appellant further submitted that there is no foul play on the part of the appellant as there is no discrepancy in the two dates mentioned on the postal receipts. He submitted that the date of 09.09.2017 was the date when the Legal Notice dated 08.09.2017 was sent by post to the respondent no.2 and the date of 10.11.2017 was stamped by the concerned Post Office at Saket Court indicating the date on which the appellant had sought for the speed-post dispatch proof from the Post Office, which is a regular practice in case of handwritten receipts. He submits that in any case, the date of 10.11.2017 was even beyond the date of the filing of the complaint and was thus immaterial and could not have been the sole reason for dismissal of the complaint. He submitted that even during the cross examination of the appellant, no question



regarding the postal receipts were put to the appellant and thus there is nothing to doubt the veracity of the same as the evidence of the appellant remained un-rebutted.

12. Learned counsel for the appellant yet further submitted that the Trial Court has erred in not considering the tracking reports for the reason that the certificate under Section 65B was not filed alongwith the same, as the same amounts to taking a hyper-technical approach and defeating the interest of the appellant. He submitted that the appellant was never asked to produce the said certificate and in any case, since compliance of Section 65B is a matter of procedure, the said requirement could have been relaxed by the Trial Court in the interest of justice, or the appellant could have been granted an opportunity to produce the said certificate.

13. Learned counsel for the respondent no.2, on the other hand, submitted that there is no illegality or perversity in the impugned order as the appellant had failed to fulfil the requirements of Proviso (b) of Section 138 of the NI Act as the Legal Notice dated 08.09.2017 was never sent to the respondent no.2 and in any event, the same could not have been received by her as the address on which the Legal Notice was allegedly sent had been sealed by the MCD, which is also reflected in the orders of the learned Trial Court as the summons sent on the said address were also returned unserved.

14. Learned counsel for the respondent no.2 further stated that the Trial Court has rightly observed that the appellant had failed to explain the discrepancy in the two dates mentioned on the postal receipts and the complaint was liable to be dismissed on the said ground alone as it raised grave suspicion as to the veracity of the said receipts and indicates that the



same has been manipulated by the appellant to make out her case.

15. Learned counsel for the respondent no.2 further submitted that the appellant has not disclosed the true facts as she has failed to disclose that the security amount of Rs.1,50,000/- paid by the respondent no.2 to the appellant has been forfeited by the appellant and has not been returned to the respondent no.2 despite the respondent no.2 vacating the rented premises.

16. This Court has heard the learned counsel for the parties and perused the documents on record.

17. As per the record before the Trial Court, the complaint under Section 138 of the NI Act was based on the second Legal Notice dated 08.09.2017 and not on the earlier Legal Notice dated 01.07.2017. The learned Trial Court, vide order dated 16.01.2018, based on the averments made in the complaint as also the pre-summoning evidence, held the complaint to be within limitation and thus maintainable. The same, despite being a vital point, seems to have been missed out by the learned Trial Court while passing the impugned order.

18. Further, the respondent no.2 had in response to the notice under Section 251 CrPC, admitted that “..*Cheque in question bears my signature and all the details were filled by me...*”. Additionally, even in the statement recorded under Section 313 of the CrPC before the learned Trial Court, respondent no.2 admitted that “*The said case is filed against me because I have to pay a sum of Rs. 85,000/- to the complainant...I am willing to pay the sum of Rs.85,000/- but I want my security cheques back*”. The same shows that there was no denial of the fact that the cheque in question was indeed issued and signed by respondent no.2 and that she



was indeed liable to pay the cheque amount to the appellant. In fact, it is apparent therefrom that the appellant was able to both meet and cross the initial threshold of the provisions of Section 138 of the NI Act.

19. Interestingly, the issue/ dispute qua mentioning of the two dates in the postal receipts was raised by the respondent no. 2 belatedly only at the stage of final arguments before the learned Trial Court. In fact, no questions qua the same have been raised on behalf of the respondent no.2 even at the stage of cross examination of the appellant. Even otherwise, the two dates under dispute were 09.09.2017 and 10.11.2017, qua which, considering the facts of the case and the explanation qua the difference in the two dates given by the appellant, it can safely be assumed by this Court that the appellant rightly contended that the original date was indeed 09.09.2017 as the complaint under Section 138 of the NI Act filed by the appellant was actually pertaining to the Legal Notice dated 08.09.2017 and that the subsequent date of 10.11.2017 was only pertaining to the date on which the proof of dispatch was issued by the Post Office.

20. Further, whence the complaint under Section 138 of the NI Act was filed within the prescribed time limit and there is no dispute qua the same and the second date of 10.11.2017 was in any event beyond the filing of the said complaint itself, the same was immaterial and inconsequential and could not be linked together or taken to mean that there was a foul play on the part of the appellant. In the opinion of this Court and considering the overall position inclusive of all the aforesaid factors as they existed, the learned Trial Court ought to have given benefit of the aforesaid factors to the appellant instead of ignoring them as it had no bearing on the stand taken or on the defence raised by the respondent. Furthermore, *admittedly*,



though the appellant has given plausible explanation qua that, it was the respondent no.2 who never raised the same during the cross-examination of the appellant at any point of time. As no such issue was raised by the respondent no.2, the same remained unrebutted. In the opinion of this Court, the two dates ought not to have been doubted by the learned Trial Court, and thus it could not be the sole reason for dismissing the complaint filed by the appellant.

21. As regards the tracking reports, though there was no certificate under Section 65B of the Evidence Act, 1872 filed by the appellant before the learned Trial Court, however, the same was a curable defect which could have been removed before passing of the final judgment. The filing of the certificate under Section 65B is a matter of procedure and the absence of the same cannot render the evidence inadmissible, without giving an opportunity to file the same at a later stage. Doing so, shall amount to taking a hyper-technical view, which is both, against the interest of the complainant as also the settled position of law. Reliance in this regard is placed upon **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**, (2020) 7 SCC 1, wherein the Hon'ble Supreme Court held as under:

“56. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.

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59. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.”



22. The aforesaid view has also been reiterated by the Hon'ble Supreme Court in *State of Karnataka v. T. Naseer*, 2023 SCC OnLine SC 1447. Thus, in the opinion of this Court, the learned Trial Court erred in holding the tracking reports to be inadmissible, without affording an opportunity to the appellant to produce the necessary certificate at a later stage.

23. Accordingly, the present appeal is allowed and the impugned order dated 04.01.2022 passed by the learned MM-04/NI Act/South, Saket Courts, New Delhi in CT No.12629/2017 titled *Adarsh Gaur vs. Metenuo Kechu* is set aside. Further, CT No.12629/2017 titled *Adarsh Guar vs. Metenuo Kechu* is restored to its original number and position with liberty to the appellant to file an appropriate application before the learned Trial Court to place on record the certificate from the appropriate authority under Section 65B of the Evidence Act, 1872 in support of tracking reports in accordance with law. In case the appellant files such an application, the Trial Court to proceed therewith in accordance with law.

24. A copy of this order be sent to the learned Trial Court for necessary information.

25. The appeal is disposed of in the above terms.

SAURABH BANERJEE, J

DECEMBER 18, 2023/akr