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

% ***Reserved on: 09th August, 2024***

Pronounced on: 11th September, 2024

\+ **CRL.L.P. 212/2021 & CRL.M.A. 20429/2021**

RAJEEV KUMAR .....Petitioner

Through: Mr. Ankur Dhall, Advocate with Mr. Manish Sharma, Advocates.

versus

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

Through: Mr. Hitesh Vali, APP for State.
Mr. Mahesh Kumar, Ms. Arti Valia, Mr. Praveen Shukla and Ms. Heena Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

CRL.L.P. 212/2021

1. This criminal leave petition is filed under Section 378(4) read with Section 482 of The Code of Criminal Procedure, 1973 ('**CrPC**') by appellant seeking setting aside of order dated 31st July 2021 ('**impugned order**') passed by Ms. Isha Singh, MM/NI Act-03/Central/ Delhi in CC No.

510085/2016 titled as '*Rajeev Kumar v Satish Kumar*', where the Trial Court dismissed the complaint of appellant and acquitted respondent no.2 for the offence under section 138 of The Negotiable Instruments Act, 1881 ('**NI Act**').

2. Leave to appeal is granted.

3. Petition is disposed of.

CRL.A._____/2024 (Registry to number the appeal)

1. Heard counsels for the parties.

Factual background

2. The said complaint was filed by complainant/appellant under section 138 of NI Act against accused/respondent no.2. The gravamen of the complaint was that the father of the complainant, Late Sh. Narain Dass and accused were colleagues, working in the same bank and branch, when the accused had approached the father of the complainant for a loan of Rs. 3,50,000/-. The said interest-free loan was advanced by the complainant's father in about October 2011, and in discharge of its liability the accused issued a cheque for a sum of Rs. 3,50,000/- in the name of the father of the complainant in January 2014, as refund of the loan amount. However, subsequently, the father of the complainant passed away in July 2014 before presenting the cheque for encashment, after which accused issued a new cheque bearing No. 201465 dated 31st December 2015 for a sum of Rs. 3,50,000/- ('**the cheque in question**') in the name of the complainant for

repayment of the loan amount. The cheque in question, on presentation, was dishonoured twice with the remarks "*funds insufficient*" *vide* separate return memos dated 3rd March 2016 and 9th March 2016. Thereafter, pursuant to legal notice dated 15th March 2016, the said complaint was lodged under section 138 of NI Act.

3. Pre-summoning evidence was led by the complainant and upon finding a *prima facie* case against the accused, he was summoned *vide* order dated 27th April 2016. The Metropolitan Magistrate ('**MM**') dismissed the complaint *vide* the impugned order and acquitted the accused of the offence under section 138 of NI Act by holding that in the present case the debt was not legally recoverable due to limitation. The relevant observation made by the MM is reproduced hereunder:

> "*41. Accordingly, the Court is in agreement with the accused for by way of the present cheque, the complainant is seeking to recover a debt which was no longer legally recoverable on the date of issuance of cheque as it was barred by the law of limitation and the cheque in question did not extend the period of limitation under section 18 of the Limitation Act, 1963."*
>
> (emphasis supplied)

4. After considering the evidence on record, the MM held that the loan partly stood paid by accused on the date of issuance of the cheque to the complainant, as payments of Rs. 2,55,000/- and Rs. 20,000/- from the account of the accused, into the account of the father of the complainant (during his lifetime) and the complainant respectively, stood proved by the accused.

Submissions of Appellant

5. The appellant being aggrieved by the impugned order, filed the present petition. The case of the appellant is that the cheque in question was issued by respondent no.2 to appellant after arriving at an oral mutual settlement, after a lapse of approximately seventeen months from his father's demise. Respondent no.2, therefore, duly accepted the legal liability on his part.

6. Counsel for appellant submits that the testimony of respondent no.2 is marred by contradictions. At the time of framing of notice under section 251 of CrPC and in application under section 145(2) of NI Act dated 26th April 2017, respondent no.2 accepted that he had taken a loan from the father of the appellant and had given a cheque of the same amount to the appellant's father. Further, after the demise of the appellant's father, he issued another cheque of the same amount in exchange for the cheque given by him earlier to appellant's father. He submitted that out of Rs. 3,50,000/-, respondent no.2 had already paid Rs. 2,75,000/- collectively to appellant and his late father and only Rs. 75,000/- was left to be paid. In contrast, at the time of his testimony in chief and during cross-examination dated 12th July 2019, respondent no.2 stated that he paid the entire amount collectively to appellant and his late father and the cheque in question was given in exchange for the first cheque to resolve the 'family dispute' of appellant.

7. Respondent no.2 took the defence that the cheque in question was issued in exchange of cheque already handed over to the late father of appellant, in order to resolve a 'family dispute' that arose in the appellant's family at that time. However, respondent no.2 being a banker himself is aware of consequences of issuing a cheque and failed to bring on record what the

'family dispute' was that forced him to take the liability on his head, despite paying the entire loan amount (as per respondent no.2 himself). He failed to prove that the cheque in question was not issued for an existing liability.

8. Counsel for appellant further contends that respondent no.2 failed to establish that the record of bank transactions from 1st September 2012 to 5th June 2014 by respondent no.2, were payments towards the loan. Appellant submits that these transactions related to a different liability as being colleagues and working in the same branch and bank, respondent no.2 and the late father of appellant were good friends and appellant's father used to monetarily help respondent no.2 on several occasions.

9. Counsel for appellant also submits that the complaint was filed well within its time, as respondent no.2 himself admitted that he issued the cheque in question to the late father of appellant five to six months before his death i.e. in the month of January or February of 2014, which does not make it a time-barred debt as the complaint was made on 12th April 2016.

Submissions of Respondent

10. Counsel for respondent no.2 submits that the appellant never gave any loan amount to respondent no.2 and states that there was no agreement executed between appellant and respondent no.2 regarding the new security cheque. Moreover, no date, month or year has been mentioned in the complaint by the appellant in respect of any loan given by the appellant to respondent no.2.

11. He further submits that appellant in his cross-examination admitted that respondent no.2 had not taken any amount from the appellant in respect of the cheque in question.

12. The photocopies of cash deposit slips that were brought on record by respondent no.2, to show the banking transactions done by respondent no.2 to discharge his liability towards the loan, remained unchallenged by the appellant. These receipts dated 1st May 2012, 7th June 2012, 31st July 2012 and 3rd October 2012 are issued against the payment of Rs. 15,000/-, Rs. 10,000/-, Rs. 10,000/- and Rs. 10,000/- respectively, in favour of Late Mr. Narain Dass, father of the appellant and by way of these receipts, a proof of repayment of Rs. 45,000/- to the father of the appellant, during his lifetime, is established. Respondent no.2 has further brought on record statement of accounts of the appellant w.e.f. 1st November 2012 till 28th August 2014, and of Late Mr. Narain Dass w.e.f. 1st May 2012 till 30th June 2014 for Rs. 2,10,000/-, and during cross-examination of respondent no.2, the said payments remained unchallenged by the appellant.

13. He also submits that the plea taken by the appellant is at a belated stage, as the loan taken by respondent no.2 was in the month of October 2011 from the father of the appellant and the cheque in question is dated 31st December 2015, which makes it a time-barred debt.

Analysis

14. Having considered the respective contentions of the parties and on perusal of the record, particularly the testimonies recorded, this Court is of the

view that the acquittal of the accused/respondent no.2 was not merited *inter alia* for the following reasons.

15. The testimony of the accused itself *ex facie* was not believable and was inherently contradictory. The accused states in its examination by way of chief that he had taken a loan of Rs.3,50,000/- from the father of the complainant in October 2011. He then states that he repaid the amount of Rs. 2,55,000/- in the period of May 2012 to June 2014 in his bank account. Even as per respondent no.2, this would amount to extinguishment of his debt liability to the extent of Rs. 2,55,000/- and would leave a repayment obligation of Rs. 95,000/- at best. However, he then states, that he gave a security cheque of Rs. 3,50,000/- as demanded by the father of the complainant due to some 'family dispute'.

16. *Firstly*, considering that the respondent no.2 was a bank official, it is inconceivable that these transactions were happening without any documentation and *secondly*, there was no reason for furnishing a '*security cheque*' if the father of complainant had a 'family dispute'. Indeed, if the respondent wanted to help his colleague i.e. the father of the complainant, he could have stated that he extended a temporary loan to him, having already extinguished his liability to the extent of Rs. 2,55,000/- earlier. The circumstances in which the '*security cheque*' of Rs. 3,50,000/- was given to the father of the complainant is quite specious and unconvincing.

17. After the demise of the father of the complainant in July 2014, the respondent no.2 states that he transferred an amount of Rs. 20,000/- in the

account of the complainant and paid the remaining amount by cash in installments. This too, does not reconcile with the assertion of the respondent no.2 that he had no liability towards the father of the complainant except for outstanding liability of Rs. 95,000/-. Even assuming there were transfers of amounts to the complainant in order to extinguish the liability towards the father, there was no reason why subsequently a fresh cheque (the one which got dishonoured) was again given in the sum of Rs.3,50,000/. The respondent no.2 asserts in its testimony that he replaced the earlier '*security cheque to the father*' with a new '*security cheque to the complainant*'. This *ex facie* seems untenable and inconceivable. There is no logic for providing a '*security cheque*' to a person, particularly by somebody who was a bank official and extremely aware of the consequences of the same. In the cross-examination, the respondent no.2 further states that he paid Rs. 75,000/- to the complainant post the demise of his father in addition to Rs. 20,000/-. Assuming, therefore, he had paid Rs. 95,000/- of the outstanding liability to the father, there can be no conceivable reason as to why he would furnish another cheque of Rs. 3,50,000/- to the complainant. This again is contradictory to the statement in para 5 made in his application under Section 145(2) of the NI Act, that he has a liability of Rs.75,000/- towards the complainant.

18. The extracts from the statement of account in the impugned order at para 22, detailing the transfer of money to the account of the father of Rs. 2,10,000/- and then to the complainant of Rs. 10,000/- after the death of the father cannot explain as to why a cheque of Rs. 3,50,000/- was given subsequently on 31st December 2015. The father of the complainant having

passed away, there was no way the complainant himself could explain as to why small driblets of Rs.10,000/- and Rs.20,000/- were being given to his father by the respondent no.2. It was submitted that due to the friendly relationship between the appellant's father and the respondent no.2, there could have been small advances which might have been given to each other in times of need. However, as per the jurisprudence under Section 138 of NI Act read with Sections 139 and 118 of the NI Act, where the presumption of liability is on the accused and it was not for the complainant to prove the liability. The reliance by the impugned order to the lack of proof furnished by the complainant in respect of these amounts, is unmerited.

19. In para 27 of the impugned order, the Trial Court states, "*However, the complainant has nowhere furnished any material on record suggesting that there was another liability apart from the present one. The complainant has not brought on record the fact of any liability of the accused towards the complainant or his father, apart from the present one, against which the payment by way of account transfer is supposedly received.*" This led the Trial Court to reach a finding that the loan partly stood paid by the accused on the date of the issuance of the cheque. However, the question ought to have still loomed in the mind of the Trial Court that if the loan stood repaid, then why the respondent no.2, being a bank official, would furnish another cheque in 2015 of Rs. 3,50,000/- calling it a '*security cheque'*. The explanation provided that it was to resolve a 'family dispute' of the complainant, does not inspire confidence. In fact, the impugned order in paras 31 and 32 reaching a

finding that the issuance of the cheque is a security cheque only to resolve the family dispute of the complainant, lacks merit and cannot be accepted.

20. The plea of '*time bar*', in that the cheque was issued on 31st December 2015, after four years of the disbursement of loan in October 2011, is also incorrectly analyzed by the Trial Court. The concept relating to limitation in situations of Section 138 of NI Act is that the furnishing of the cheque/negotiable instrument in itself invites a presumption of liability. The liability even if of a previous period, gets revived, due to the furnishing of the cheque, acknowledging therefore, that the repayment is to take place.

21. The law relating to a time-barred debt and the revival by virtue of furnishing a cheque by the drawer, is well settled. This is based upon the concept that a promise to pay wholly or in part a debt which cannot be enforced by the creditor being barred by the law of limitation, is a valid agreement, if it is made in writing and signed by the person. This is encapsulated in Section 25(3) of the Indian Contract Act, 1872 ('**the ICA**') which when read along with Illustration (e), crystallizes the concept clearly. The said provisions are extracted as under:

> *"25. Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law. —An agreement made without consideration is void, unless—*
> …
> *(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part*

a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

…

(*e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract."*

22. The Division Bench of Kerala High Court in ***Dr. K.K. Ramakrishnan v Dr. K.K. Parthasaradhy & Anr.*** 2003 SCC OnLine Ker 420 in dealing with a similar issue stated as under:

"10. Learned counsel for the petitioner submits that Section 25(3) of the Contract Act cannot be invoked to interpret the provisions of Section 138 of the Negotiable Instruments Act.

11. The contention cannot be accepted. Section 138 provides for a penalty in a case where a cheque is dishonoured on account of insufficiency of funds. The cheque has to be by way of payment of a "legally enforceable debt or aliability". The liability may arise out of a contract or otherwise. Thus, to determine as to whether or not a liability is legally enforceable, the provisions of the Contract Act cannot be said to be irrelevant. These can provides a cause for a legal liability. Resultantly, when a person writes a cheque and delivers it to a person, the drawee not only gets the civil right to present the cheque and recover the amount, but in the event of the cheque being dishonoured the person who has issued the cheque becomes liable for prosecution under Section 138. In other words, the issuance of a cheque becomes a promise to pay under Section 25(3) of the Contract Act. The delivery of the cheque to the drawee creates a right to recover the money. On the cheque being dishonoured the person concerned becomes liable for

prosecution. The execution of the cheque is an acknowledgment of a legally enforceable liability and when it is dishonoured the consequences of prosecution and punishment follow.

…

13. Mr. Benny Gervacis contended that under Section 18 of the Limitation Act the acknowledgement has to be made before the expiry of the period of limitation. In the present case, the cheque was executed after the limitation had already expired. Thus, it cannot amount to an extension of limitation.

14. For the purpose of the present case, it does not appear to be necessary to go into this matter in detail. It may, however, be mentioned that under Section 25(3), a promise can be made even in a case where the limitation for recovery of the amount has already expired. Such a promise has to be in writing. It can be in the form of a cheque. When a cheque is delivered to the payee, the person is entitled to present the cheque to the bank and seek payment. In such an event, if the cheque is dishonoured, the liability under Section 138 would arise. It would not be permissible for the accused to contend that the liability was not legally enforceable.

…

22.The matter appears to have been considered by their Lordships of the Supreme Court in A.V. Murthy v. B.S. Nagabasavanna, (2002) 2 SCC 642. On a perusal of the judgment, we find that the matter was considered by the Supreme Court in the context of the provisions contained in the Negotiable Instruments Act as well as those of the Contract Act. However, the issue of limitation was left open. But what deserves mention is that even though the learned Sessions Judge had quashed the proceedings as the limitation in recovering the money had expired and the

> *order had been upheld by the Karnataka High Court, yet, their Lordships had reversed the decision. This is indicative of the fact that the accused was not entitled to escape liability to suffer penalty merely on account of the fact that the limitation for recovery of the amount had expired before the date of the issue of the cheque. When examined in this light, the dismissal of the SLP in Joseph's case cannot be said to be the enunciation of law which may be binding under Article 141. In fact, a perusal of the order shows that it was wholly on "the facts of the case as available on the records" that their Lordships had dismissed the Special Leave Petition."*
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> (emphasis supplied)

23. The Supreme Court in ***A.V. Murthy v B.S. Nagabasavanna*** (2002) 2 SCC 642 recognized the application of Section 25(3) of the ICA while disallowing a dismissal of a complaint under section 138 of NI Act, at the behest of a complainant, where a cheque had been given for a liability which was time-barred. The relevant portion is extracted as under:

> *"5. As the complaint has been rejected at the threshold, we do not propose to express any opinion on this question as the matter is yet to be agitated by the parties. But, we are of the view that the learned Sessions Judge and the learned Single Judge of the High Court were clearly in error in quashing the complaint proceedings. Under Section 118 of the Act, there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration. Even under Section 139 of the Act, it is specifically stated that 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 discharge, in whole or in part, of any debt or other liability. It is also pertinent to note that under sub-section (3) of Section 25 of the Indian Contract Act, 1872, a promise,*

> *made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits, is a valid contract. Moreover, in the instant case, the appellant has submitted before us that the respondent, in his balance sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance sheet as on 31-3-1997 is also produced before us. If the amount borrowed by the respondent is shown in the balance sheet, it may amount to acknowledgment and the creditor might have a fresh period of limitation from the date on which the acknowledgment was made. However, we do not express any final opinion on all these aspects, as these are matters to be agitated before the Magistrate by way of defence of the respondent."*
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> (emphasis supplied)

24. The Supreme Court in ***S. Natarajan v Sama Dharman & Anr.*** (2021) 6 SCC 413 expressed the opinion that, the High Court had erred in quashing the complaint under section 138 NI Act, on the ground that debt or liability was barred by limitation since that question can be decided only after evidence has been adduced being a mixed question of law and fact. The relevant paragraphs are extracted as under:

> *"7. In our opinion, the High Court erred in quashing the complaint on the ground that the debt or liability was barred by limitation and, therefore, there was no legally enforceable debt or liability against the accused. The case before the High Court was not of such a nature which could have persuaded the High Court to draw such a definite conclusion at this stage. Whether the debt was time-barred*

or not can be decided only after the evidence is adduced, it being a mixed question of law and fact.

…

9. In Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] , the legal question before this Court pertained to the proper interpretation of Section 139 of the NI Act which shifts the burden of proof on to the accused in cheque bouncing cases. This Court observed that the presumption mandated by Section 139 of the NI Act includes a presumption that there exists a legally enforceable debt or liability. This is of course in the nature of rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. This Court further observed that Section 139 of the NI Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. This Court clarified that the reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. This Court, then, explained the manner in which this statutory presumption can be rebutted. Thus, in cheque bouncing cases, the initial presumption incorporated in Section 139 of the NI Act favours the complainant and the accused can rebut the said presumption and discharge the reverse onus by adducing evidence."

(emphasis supplied)

25. Both ***A.V. Murthy*** (*supra*) & ***S. Natarajan*** (*supra*) were noticed by the Supreme Court more recently in ***K. Hymavathi v. State of A.P. & Anr.*** 2023 SCC OnLine SC 1128 in dealing with a challenge to quashing of a 138 NI Act proceeding, basis expiry of limitation of the promissory note, prior to the

issuance of cheque, and it not being a legally recoverable debt under section 138 of NI Act. The Court took a view that these prior decisions in ***A.V. Murthy*** (*supra*) & ***S. Natarajan*** (*supra*) had considered all these aspects. The relevant paragraphs are extracted as under:

> *"12. Having referred to the judgments cited, prima facie we are of the opinion that the decision in S. Natarajan and A.V. Murthy (supra) has taken into consideration all aspects. No other elaboration is required even if the observations contained in the case of Expeditious Trial of Cases under Section 138 of NI Act (supra) is taken note, since, whether the debt in question is a legally enforceable debt or other liability would arise on the facts and circumstance of each case and in that light the question as to whether the power under Section 482 CrPC is to be exercised or not will also arise in the facts of such case. Even otherwise we do not see the need to tread that path to undertake an academic exercise on that aspect of the matter, since from the very facts involved in the case on hand ex facie it indicates that the claim which was made in the complaint before the Trial Court based on the cheque which was dishonoured cannot be construed as time-barred and as such it cannot be classified as a debt which was not legally recoverable, the details of which we would advert to here below. In that view, we have chosen not to refer to the cases provided as a compilation as it would be unnecessary to refer to the same."*
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> (emphasis supplied)

26. The Madras High Court in ***M. Balaji v. Perim Janardhana Rao & Ors.*** 2020 SCC OnLine Mad 28058 also deliberates upon this aspect in reference to a proceeding under section 138 of NI Act. The relevant portion is extracted as under:

"60. Sub-section (3) of section 25 Indian Contracts Act deals with acknowledgement time barred debt. <u>According to Pollock and Mulla (The Indian Contract Act and Specific Relief Act - 14th Edition, Lexis Nexis - Butterworths Wadhwa), in order to invoke the provisions of Section 25(3) of the Indian Contracts Act, the following conditions must be satisfied</u>: —

1. It must be referred to a debt which the creditor but for the period of limitation, might have enforced;

2. There must be a distinct promise to pay wholly or in part such debt and

3. The promise must be in writing signed by the person or by his duly appointed agent.

...

63. Cheque is defined under section 4 of the Negotiable Instruments Act as a "bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand". Cheque is therefore a negotiable instrument carrying the promise implicitly, unlike a pro-note where the promise is explicit and mandatory. Therefore, limitation has to be reckoned from the the date the cheque and not on the fact 'whether the cheque was honoured or dishonoured'. Under the Negotiable Instruments Act, the issuance of cheque is to be presumed to be issued for discharge of debt. The consequence event whether the said cheque on presentation honoured or not, is immaterial.

64. In the opinion of this Court, even if the said cheque is not presented in time and become stale, but it is proved that the cheque was issued with intention to discharge the debt or part of the debt then, the limitation has to be reckoned from the date of the cheque considering the cheque as acknowledgment of debt. As far as the facts of this case in hand, the cheque in the name of the plaintiff gives him the cause of action to sue and suit being filed within 3 years

> *from the date on which the cheque bear, this prima facie saves the limitation. The plaintiff cannot be de-suited on the ground of limitation. However, the plaintiff fails to succeed, since, this Court has held that the plaintiff has not proved his case for recovery of money and the cheque is not issued for any enforcible debt. Therefore, the discussions on limitation based on the fact whether dishonour of cheque will save limitation is academics. Issues 3 and 5 are answered accordingly."*
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> (emphasis supplied)

27. The Supreme Court in ***Yogesh Jain v Sumesh Chadha*** 2022 SCC OnLine SC 2195 also took the view that the issue of whether a cheque was issued for a time-barred debt or not, is a matter of evidence. This was referred with approval by the Supreme Court in ***Atamjit Singh v. State (NCT of Delhi) & Anr.*** 2024 SCC OnLine SC 99. The relevant portion from ***Yogesh Jain*** (*supra*) is extracted as under:

> *"8. Once a cheque is issued and upon getting dishonoured a statutory notice is issued, it is for the accused to dislodge the legal presumption available under Sections 118 and 139 resply of the N.I. Act. Whether the cheque in question had been issued for a time barred debt or not, itself prima facie, is a matter of evidence and could not have been adjudicated in an application filed by the accused under Section 482 of the CrPC."*
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> (emphasis supplied)

28. Notably and most importantly, in para 31 of the impugned order in the present case, Court has reached a conclusion that giving a cheque of Rs. 3,50,000/- to the complainant, after the father of the complainant passed away in July 2014, despite having paid Rs. 2,55,000/- to the father between May

2012 till June 2014, another Rs. 20,000/- to the complainant in July-August 2014 and another Rs. 75,000/- to the complainant by way of cash (as per accused), did not inspire the confidence of this Court.

29. In assessing limitation, the Trial Court determines the date of loan as approximately 30th April 2012 (para 40 of the impugned order), taking the period of limitation to April 2015. Cheque in question was issued on 31st December 2015 and therefore, the Trial Court held in favour of the accused, that they were able to rebut the statutory presumption that there was no legally enforceable debt.

30. Considering that the Trial Court has considered the evidence, the principles in ***S. Natarajan*** (*supra*) & ***Yogesh Jain*** (*supra*) may not be fully applicable at this stage. The matter is now in appeal against the acquittal and the Court has perused the evidence on record. Based on the analysis above and that the Trial Court itself found it unbelievable that a cheque of Rs. 3,50,000/- would be given in 2015, despite the accused having asserted in the trial that he had repaid the debt of the father, the only question remains is on the legal enforceability of the debt.

31. In the opinion of this Court, the provisions of Section 25(3) of ICA are squarely applicable. A cheque as per section 6 of the NI Act is a "*bill of exchange*", which in turn is defined in section 5 of the NI Act as an instrument in writing signed by the maker directing payment of certain sum of money to a certain person. The maker of the cheque is the 'drawer' and the person to be paid is the 'drawee' as per section 7 of the NI Act.

32. Therefore, *a priori* the cheque itself becomes a promise made in writing signed by the person to pay wholly or in part debt, which otherwise, may not be payable due to law of limitation. Per section 25(3) of the ICA, this would be an agreement in itself. Section 139 presumption under the NI Act which presumes that the cheque is in discharge in whole or part liability of any debt or liability would therefore, actually come into play. The contrary position of the accused that no debt or liability subsists having extinguished by the law of limitation, would be then unmerited and untenable, since a fresh agreement comes into operation by the tendering of the cheque. By issuing the cheque, the drawer is acknowledging a legally enforceable liability and he ought not be entitled to claim that the debt had become barred by limitation.

33. There can be an argument that even though section 25(3) of the ICA creates a contractual promise to pay, a civil suit could subsist for enforcing that promise but a penal provision under section 138 of NI Act cannot be invoked basis the explanation to Section 138 which restricts "*debt or liability"* to *"legally enforceable debt or liability."*

34. Regarding the facts of the case in question, the presentation of the cheque to the father was 5-6 months before the death of his father i.e. in the months of January/February 2014. On that basis, even though the loan was allegedly taken in 2012 as per the finding of the Trial Court, the earlier cheque presented in 2014 would amount to an acknowledgment in writing of the liability and therefore, a fresh period of limitation would commence as per section 18 of The Limitation Act, 1963. Therefore, the furnishing of the cheque in question on 31st December 2015, would still be for a legally

enforceable debt or liability. This is not withstanding the other aspect, which had been pleaded by the appellant, that he had an oral settlement post the death of the father with the accused.

35. The Bombay High Court in ***Vijay Ganesh Gondhlekar v Indranil Jairaj Damale*** 2007 SCC OnLine Bom 913 has dealt with a similar issue of revalidation of a cheque in discharge of the initial liability alleged to have been unrecoverable due to limitation. The relevant extracts are as under:

> *"7. Mr. Kalar learned counsel for the accused/applicant contended that the limitation for recovery of loan amount under civil law is only 3 years and the cheque is dated 1-3-1999. He submits that the complainant seeks to recover the barred debt. He also submits that there is no acknowledgment at all of the debt within limitation and hence the debt is completely barred on the date of issue of cheque. The argument has no force for two reasons. Firstly complainant along with the complaint has filed a deposit receipt said to be issued by the accused. It shows that it was first renewed in 1996 and then in 1997. It is renewed under the signature of the accused. The said acknowledgment mentions that the date of repayment was extended upto 1998. Finally there is an endorsement that the contract is renewed upto 1-3-1998. As said earlier it is under the signature of the accused. It is obvious that the accused acknowledged the debt by making endorsement on the same document that the contract is renewed. Thus if this acknowledgment is taken into consideration the debt could be recovered even under the civil law within 3 years from 1-3-1997. The time of three years from 1-3-1997 would expire on 1-3-2000. The cheque was tendered in bank on 10-3-1999. Even complaint under section 138 is filed in April, 1999. Obviously even on date of institution of complaint the debt was legally recoverable. The ratio in Mr. Narendra V.*

Kanekar v. The Bardez Taluka Co-op. Housing Mortgage Society Ltd., 2006 (7) Mh. L.J. 11 : 2006 (3) All MR 673 cited by Shri Kalar could squarely be applied to this case. Next reason is that, the cheque was issued and renewed from time to time could itself, be treated as an acknowledgment. The cheque bears the amount, the name of the payee and the signature of the drawer of the cheque as well as the date of issue. Therefore, a cheque itself is a document which could fall within the scope of section 18 of the Limitation Act. Acknowledgment is given before the expiry of period of limitation since time was extended under the signature. In the instant case therefore we need not go into the question whether the claim could be said to be barred by limitation if a suit was to be filed…"

8. Learned counsel for the applicant had also relied on a decision of this Court in Smt. Ashwini Satish Bhat v. Shri Jeewan Divakar, II (1999) BC 519. This decision has no bearing on the case at hand as in the case at hand there is an acknowledgment before expiry of limitation."

(emphasis supplied)

36. Reliance in ***Vijay Ganesh*** (*supra*) was on a view taken in ***Narendra V. Kanekar v Bardez Taluka Co-op. Housing Mortgage Society Ltd. & Anr***. 2006 SCC OnLine Bom 457 by a single Judge of the Bombay High Court that the debt becomes legally enforceable if a cheque is given in payment of debt and therefore, proceedings under section 138 of NI Act would lie. The relevant paragraph is extracted as under:

"10. Mere giving a cheque, without anything more, will not revive a barred debt, because cheque has to be given, as contemplated by the explanatory in discharge of a legally enforceable debt. There is no doubt that in terms of the Indian Limitation Act, 1963, a signed acknowledgment of

liability made in writing before the expiration of the period of limitation, is enough to start a fresh period of limitation. Likewise, when a debt has become barred by limitation, there is also section 25(3) of the Contract Act, by which, a written promise to pay, furnishes a fresh cause of action. In other words, what Clause (3) of section 25 of the Indian Contract Act in substance does is not to revive a dead right, for the right is never dead at any time, but to resuscitate the remedy to enforce payment by suit, and if the payment could be enforced by a suit, it means that it still has the character of legally enforceable debt as contemplated by the explanation below section 138 of the Act. As far as this aspect of the case is concerned, the learned Division Bench observed that to determine as to whether or not a liability is legally enforceable, the provisions of the Contract Act cannot be said to be irrelevant. This can provide a cause for a legal liability. Although the primary question answered by the Division Bench was that a cheque becomes a promise to pay under section 25(3) of the Contract Act, this view need not be followed by this Court in the light of the Judgment of this Court in the case of Ashwini Satish Bhat v. Shrijeevan Divakar Lolienkar (supra) and the other two judgments referred to hereinabove. Nevertheless, the Division Bench Judgment is relevant to the extent that it holds that a promise to pay in writing as per section 25(3) of the Indian Contract Act, 1872, matures into an enforceable contract, which can be enforced by filing a Civil Suit. If a suit could be filed pursuant to a promise made in writing and signed by the person to be charged therewith, as contemplated by Clause (3) of section 25 of the law of Contract, then, in my view, the debt becomes legally enforceable and if a cheque is given in payment of such debt is dishonoured and subsequently, the statutory notice is not complied with, then the person making the promise in writing and issuing the cheque, would still be liable to be punished under section 138 of the Act."

(emphasis supplied)

37. The furnishing of a cheque of a time-barred debt effectively resurrects the debt itself by a fresh agreement through the deeming provision under section 25(3) of ICA. The original debt therefore, through section 25(3) of the ICA, becomes legally enforceable to the extent of the amount the cheque has been given. This resonates also with practical considerations. Persons who have chosen to escape liability, can draw a cheque, in order to clear an earlier debt upon persuasion by the creditor. By the act of drawing a cheque, the promisor i.e. the drawer, is effectively stating that he has a liability to pay the drawee. Drawing of the cheque in itself, is acknowledgment of a debt or liability. It is the resurrection or the revival of the prior debt which would trigger the provisions under section 138 of NI Act. To deny a complainant/drawee of invoking the penal provisions under section 138 of NI Act, despite the categorical premise of section 25(3) of the ICA recognizing a fresh agreement to pay, would be an unfortunate disentitlement.

38. Impugned order dated 31st July 2017, acquitting the respondent no. 2, is set aside.

39. List on 7th October 2024 for further directions. Respondent no. 2 be present on the next date scheduled.

40. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

SEPTEMBER 11, 2024/MK/na