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

Judgment reserved on: 07.02.2018

% Judgment delivered on: 09.07.2018

+ CRL.A. 965/2016

BHAWISH CHAND SHARMA

..... Appellant Through: Mr. S.N. Gupta, Advocate

versus

BAWA SINGH

..... Respondent Through: Mr. M.N. Dudeja and Mr. Anuj Chauhan, Advocates

CORAM: HON'BLE MR. JUSTICE VIPIN SANGHI

JUDGMENT

VIPIN SANGHI, J.

1. The present appeal has been preferred against the judgment dated 31.07.2014 whereby the learned Metropolitan Magistrate, Karkardooma Courts, New Delhi in complaint No. 266/13 has acquitted the respondent/accused of the offence under Section 138 of the Negotiable Instruments Act, 1881 (NI Act).

Background:

2. The case of the appellant/complainant, as narrated in the complaint is that the respondent/accused purchased a property from him i.e. property bearing No. B-66, East Nathu Colony, Delhi-110094, and in the discharge of his liability, he made part payment in cash and also issued a cheque bearing No. 509034 dated 12.02.2006 amounting to Rs. 5,00,000/- drawn on Kangra Co-Operative Bank Ltd., A Block, JagatPuri, Delhi 110051, being the balance payment relating to the aforesaid purchase of property. The said cheque was presented for encashment twice, and on both occasions, same was dishonoured with remarks "insufficient funds". The appellant served a legal demand notice dated 26.08.2006 to the respondent by courier as well as UPC, but even after receipt of the legal notice, the respondent did not make the payment. So, the present complaint was filed by the appellant under Section 138 of the Negotiable Instrument Act.

3. The accused was summoned. Notice under Section 251 Cr PC was framed on 31.03.2009. The respondent pleaded "not guilty" and claimed trial.

4. Before the Learned MM, the appellant Sh. Bhawish Chand Sharma examined himself as CW-1 in post notice evidence. Appellant filed his evidence by way of affidavit CW1/A. He also proved the cheque in question Ex. CW1/1, the cheque returning memo, Ex. CW1/2, envelope sent through the courier Ex. CW1/3, courier receipt Ex. CW1/4, UPC certificate

Ex.CW1/5 and legal demand notice Ex. CW1/6. He also examined Parvesh Sharma, his son as CW-2.

5. The appellant/ complainant in his cross examination stated that the property in question was sold to the respondent for a sum of Rs. 20,00,000/- out of which Rs. 15,00,000/- was received in cash and two cheques bearing no. 509032 and 509033 of Rs. 2,00,000/- each on Kangra bank was received at the time of registry. The registered sale deed Ex. CW1/DA showed the value of the property as Rs.4,00,000/-. The two cheques received by the appellant/complainant amounting to Rs.4, 00,000/- in total have been mentioned in the sale deed. He further deposed that the amount of Rs.4,00,000/- was towards sale consideration and volunteered that Rs.1,00,000/- was for building material. He, however, admitted that the presence of building material, and its sale to the accused for Rs.1,00,000/- was not mentioned in the sale deed; the legal notice, and; the complaint.

6. After the conclusion of appellants post summoning evidence, statement of respondent was recorded u/s 313 of the Criminal Procedure Code on 21.03.2013, wherein the respondent/accused stated that the complaint was false and frivolous. He also stated that on 07.02.2006, he had issued two cheques amounting to Rs. 2,00,000/- each - one in the name of the appellant and another in the name of wife of the appellant/complainant in consideration of the purchase amount relating to property bearing no. B-66, East Nathu Colony, Delhi-94, which he had purchased from the appellant/complainant and his wife.

7. Those cheques were shown to the Registrar also by the appellant/complainant at the time of the registration of documents relating to the said property. After the registration of documents, these cheques were returned to him by the appellant, as the sellers submitted that they did not have any bank account. On return of the same, he made a payment of Rs.4,00,000/- in cash to the appellant/complainant. The respondent stated that some electricity dues were remaining outstanding relating to the property in question. To provide a guarantee for payment of the same (as the appellant/complainant was not clearing his dues), he had issued a blank cheque containing his signature and the figure of Rs.5,00,000/- (not in words) to one Mr. Surender Kumar who was acting as an agent on behalf of the appellant in a Panchayat.

8. The accused also chose to lead his evidence in his defence. He examined two witnesses. Sh. Malkeet Singh was examined as DW-1 and Sh. Kewal Singh was examined as DW-2. Malkeet Singh (DW-1) stated that after the agreement between the parties, some dispute arose regarding outstanding electricity dues. The complainant called one broker Surender Kumar for settling the dispute. Surender Kumar requested the complainant for some payment to him for making efforts to get the dispute settled. On this, the respondent issued the cheque for Rs.5 lakhs in blank (the column meant for name was kept blank) to Surender Kumar on the same day, as security. He further deposed that after the registry, the respondent demanded his cheque of Rs.5 lakhs from Surender Kumar, and Surender Kumar replied that he has handed over the same to the appellant/ complainant. In response to a court question, he also stated that the demand

for the cheque was made by the respondent from Surender Kumar in his presence during a meeting after the registry of the sale deed in his office. DW-1 was cross examined by the complainant. In his cross examination, he stated that he had no personal knowledge regarding the present dispute between the parties. He also admitted that he did not know Surender Kumar, but he had seen him one or two times. He did not know whether Surender Kumar was the middleman. He was not present when the sale deed was registered in the office of the Registrar. He did not have any knowledge regarding the amount of sale/ purchase in the sale transaction. He stated that the accused had told him that Surender Kumar had not returned the cheque of Rs.5 lakhs.

9. Kewal Singh, DW-2, inter alia, stated in his examination in chief that some electricity bills were remaining to be paid, amounting to around Rs.22 lakhs, which the complainant had agreed to clear. Regarding the same, a meeting was held in the year 2006 (probably) in the morning around 11:00 a.m. in his office. He gave the names of the persons who were present in the meeting, which included Surender Kumar. Surender Kumar stated that he had no faith in the complainant as to whether he will clear the bills or not. Surender Kumar demanded a cheque from the accused Bawa Singh. Accordingly, the cheque amounting to Rs.5 lakhs was given as security by the accused Bawa Singh to Surender Kumar. He stated that the cheque was written in words. He again said that the amount of Rs.5 lakhs was written in figure, and that nothing else was written on the cheque. He stated that Surender Kumar promised to get the electricity bills cleared within the remaining period of one month of registry. But the bills could not be

cleared for reasons not known to him. He stated that Surender Kumar got prepared a purported receipt from DESU regarding clearing of bills and the same was handed over by him to the complainant, who in turn handed over the same to the accused. The accused demanded back his cheque for Rs.5 lakhs in the meeting held on the same day as the registry of the sale deed, when Surender Kumar informed that the cheque had been handed over by him to the complainant. DW-2 was also cross examined. He stated that he had not seen the electricity bill amounting to Rs.22 lakhs himself. He had not seen any official from the electricity department visiting the property in question.

10. The learned M.M. rejected the complaint and acquitted the respondent. The Court held that the appellant/complainant failed to show that there existed any legal liability on the part of the respondent/accused for which the cheque was issued. The learned MM held that:

i) Though the entire sale consideration was stated to be Rs.20 lakhs, the apparent sale consideration disclosed in the sale deed was only Rs.4 lakhs;

ii) Though the complainant claimed that Rs.15 lakhs had been received in cash, and the balance outstanding was Rs.5 lakhs, he had accepted two cheques totalling to Rs.4 lakhs which were disclosed in the sale deed, thereby not explaining as to how the amount of Rs.1 lakh was sought to be recovered.

iii) If the accused had been returned the two cheques of Rs.4 lakhs, then why would the accused replace the same with a cheque for Rs.5 lakhs, is not clear;

iv) The complainant claimed the difference of Rs.1 lakh towards sale of the construction material lying on the ground floor of the building in question. However, this fact was not stated either in the sale deed, or in the legal notice, or even in the complaint;

v) The complainant stated in his cross examination that the cheque in question was given to him when he was alone. However, he examined his son CW-2 Pravesh Sharma, who stated that the cheque was given in his presence and in the presence of his mother and younger brother. CW-2 is not a witness to the sale deed Ex. CW-1/DA.

11. Pertinently, the learned MM also rejected the defence of the accused that he had, in return for the two cheques of Rs.4 lakhs, paid Rs.4 lakhs in cash to the complainant. The learned MM also rejected the explanation furnished by the accused with regard to the issuance of the cheque of Rs.5 lakhs which bore his signature, as well as the amount of Rs.5 lakhs filled in.

12. The learned MM observed that the obligation to pay the electricity dues till the date of the sale deed was of the complainant. In this situation, there was no explicable reason as to why the accused would issue a cheque for Rs.5 lakhs as security to Mr. Surender Kumar for clearing/ settling the electricity dues. The said defence of the accused was held to be not

believable as it was against the natural course of human behaviour and conduct.

13. The submission of counsel for the appellant is that, admittedly, the accused had issued the cheque of Rs.5 lakhs under his signatures. If there was no obligation on the part of the accused to clear the alleged electricity dues, there was no reason for the accused to issue the same towards "security". Moreover, the defence of the accused that he had replaced the two cheques of Rs.2 lakhs each (in aggregate Rs.4 lakhs) with cash payment is wholly unsubstantiated and not even probablised, since no receipt of payment of cash has been produced, and no witness to the said alleged payment has been produced by the accused. Pertinently, the accused himself also did not appear as his own witness while examining two other witnesses.

14. Learned counsel further submits that since the amount of Rs.4 lakhs by cheque was the apparent consideration disclosed in the sale deed, it is unbelievable that the accused would pay the said amount in cash without obtaining a receipt, and thereby jeopardise his sale transaction. Learned counsel has further submits that though DW-1 and DW-2 had stated that the accused was informed soon after the execution of the sale deed - that the cheque of Rs.5 lakhs allegedly delivered to Surender Kumar had been handed over by Surender Kumar to the complainant, the accused took no steps whatsoever either against the complainant, or the said Surender Kumar soon upon learning of the same. Learned counsel submits that the story set up by the accused to explain the issuance of cheque of Rs.5 lakhs is, therefore, completely unbelievable and not probablised.

15. So far as the issue of cheque of Rs.5 lakhs- in lieu of the two cheques of Rs.2 lakhs each is concerned, learned counsel for the appellant has argued that since the accused had himself issued the cheque of Rs.5 lakhs voluntarily (it is the defence of the accused that he had issued the said cheque of Rs.5 lakhs with the amount filled in), it was not necessary for the appellant to explain as to why the amount filled in the cheque was Rs.5 lakhs, and not Rs.4 lakhs. In any event, the appellant had explained the same by stating that the additional amount of Rs.1 lakh was paid by the accused in respect of the construction material lying at the site of the property purchased by the accused from the appellant and his wife.

16. Learned counsel for the appellant submits that in the brief synopsis filed on behalf of the respondent in this Court, which is duly supported by the affidavit of the respondent dated 30.09.2016, he has himself explained that out of the total consideration of Rs.20 lakhs, Rs.15 lakhs had been paid *in cash "and on 12.03.2016 a sum of Rs.1 lac further in advance payment was made to the appellant just one day before the Registry and balance amount of Rs.4 lacs was paid by the respondent to the appellants by way of* the two cheques 2 lacs each". Learned counsel points out that there is no evidence led by the accused to substantiate the plea that apart from Rs.15 lakhs paid in cash (which is acknowledged by the appellant), a further sum of Rs.1 lakh was paid in cash on 12.03.2016 i.e. one day before the registration of the sale deed. The said plea of payment of Rs. One Lakh on 12.03.2016 is not probabalised. In fact, this statement of the accused-duly supported by his affidavit, explains the issuance of the cheque of Rs.5 lakhs by the deceased.

17. On the other hand, learned counsel for the respondent has argued that the impugned judgment does not call for interference, since the defence of the accused has been probablised and the guilt of the accused has not been proved beyond all reasonable doubt. The complainant has to stand on his own legs. There are serious and gaping holes in the story of the appellant, since it is not explained as to why two cheques of Rs.2 lakhs each issued in the name of the appellant and his wife, were replaced by one cheque of Rs.5 lakhs drawn in favour of the appellant. Learned counsel submits that the electricity dues outstanding, as on the date of sale of the said property, are to the tune of Rs.22.466 lakhs. Thus, no amount is payable by the accused to the appellant.

18. Learned counsel further submits that the suit filed by the appellant, inter alia, to seek a declaration that the sale deed dated 13.03.2006 is null and void, and to seek a decree of possession in respect of the said property along with a decree of Rs.5.40 lakhs towards use and occupation charges of the suit property @ Rs.15,000/- per month with interest @ 24% per annum from 24.12.2007 to 23.12.2010, and to seek a decree of perpetual injunction against the accused was dismissed by the learned District Judge on 14.11.2014.

19. Both counsels have relied upon case laws which shall be discussed later in this judgement.

20. Judgment was initially reserved on 15.03.2017. While preparing the same, the Court felt the need to seek clarification on the aspect whether any outstanding electricity dues existed, as on the date of sale. Consequently,

the matter was fixed to seek clarification on 09.01.2018. The respondent was directed to file an affidavit disclosing the electricity meter/ connection number being used by him along with the copy of the latest paid bill. The same was filed by the respondent. The appellant sought leave to place on record some additional documents obtained by him from the office of the electricity department/ company, to establish that there were no outstanding dues in respect of the electricity connection installed in the premises in question at the time of the sale to the respondent. The appellant was permitted to bring the said additional documents on record along with an additional affidavit. The appellant has also filed the said affidavit.

21. Further arguments were heard in the matter on 07.02.2018, and judgment was reserved on the said date.

22. I have considered the submissions of learned counsels and also perused the affidavits filed by them in pursuance of the orders passed by me to seek clarification.

23. I may, firstly, take note of the factual position as emerging on the record in relation to the existence of liability towards electricity dues as on the date of the sale deed. In the additional affidavit filed by the respondent- in compliance of the order dated 09.01.2018, the respondent states that the property was purchased by the appellant from one Gulzar Singh vide a general power of attorney/ agreement and will dated 20.11.1987 to the extent of 100 Sq.Yds. In respect of the remaining 100 Sq.Yds., a similar agreement was executed between Gulzar Singh and Smt. Shakuntala Devi- the wife of the appellant. The respondent states that as there were three electricity meters installed in the premises when the same was purchased by

the appellant and his wife. The respondent claims that the DVB had issued a reminder in the name of Gulzar Singh, alleging that there was Fraudulent Abstraction of Electricity (FAE)/ direct theft dated 14.10.1999 in respect of the three electricity connections. The respondent further states that there was an outstanding electricity due of Rs.18,12,109.69/- which was reflected in the bill dated 13.01.2005 raised by the electricity supply company. He states that he had purchased the said property in the year 2006 from the complainant on "as is where is basis" wherein the said electricity meters were installed. He states that the complainant had failed to pay the outstanding amount, stating that he had cleared the bills issued in the name of his wife, and bills raised in his name would be cleared soon without burdening the respondent. He obtained a duplicate bill in respect of the meter in the name of Gulzar Singh, showing the outstanding dues as in June, 2009. He claims that on his visit to the electricity enforcement department on 10.01.2018, he could not retrieve the information as the case filed relating to the meters is involved in many cases, and the information could not be divulged. He discloses that two electricity connections are installed in the premises presently– one in his name, and one in the name of Smt. Shakuntala. He has placed on record the bills raised by BSES Yamuna Power Ltd in respect of presently installed electricity connections.

24. On the other hand, the appellant has filed his affidavit wherein he states that the electricity connections remained in the name of Gulzar Singh till the name was changed to that of Smt. Shakuntala in the month of March 2006. The appellant has placed on record copy of the bill raised in the name of Gulzar Singh in respect of last billing month "February 2005" and the

bills generated in the name of Smt. Shakuntala, thereafter. He submits that the said bills do not show any arrears of electricity dues under any head whatsoever, much less on account of FAE or direct theft. He submits that all the electricity dues/ bills were paid from time to time. He has also placed on record the "No Objection Certificate" issued by BSES Yamuna Power Ltd. in respect to the electricity connection obtained by Gulzar Singh, which clearly states that no dues are pending against the said electricity connections.

25. From the documents filed by the respondent, and the documents filed by the appellant, and the statements made by them in their respective affidavits, it is absolutely clear that the respondent has merely raised a bogie of there being some outstanding electricity dues from the time when Gulzar Singh occupied the property in question. There is absolutely no basis for the same. It is not the case of the respondent that the electricity supply company i.e., BSES Yamuna Power Ltd. has raised any demand in respect of the electricity meters installed in his premises, ever since he came in occupation of the same. He has never faced any threat of disconnection on account of the alleged outstanding dues. Electricity bills raised by supply company for December 2017, which are placed on record do not show any outstanding arrears. They are based on the actual consumption of electricity for the previous month. It is not the defence of the respondent accused that the electricity company has taken any steps against him– as the user of the electricity connections in the premises, or his property, to recover the so called dues of Rs. 18,12,109.69/-, or any such amount.

26. On the other hand, the appellant has clearly shown from the documents placed on record that there were no outstanding dues in respect of the electricity connection obtained by Gulzar Singh. After the transfer of the connections, the electricity bills raised in the name of Smt. Shakuntala were regularly paid. BSES Yamuna Power Ltd. has also issued a certificate, certifying that there are no electricity dues of BYPL outstanding in respect of K No. 12600B090002, and that he is free to surrender the said electricity connection, on 18.09.2006. The electricity dues of Gulzar Singh, in any event, would be barred by limitation in view of the judgment of this Court in ***H.D. Shourie v. Delhi Municipal Corporation AIR 1987 DEL 219.***

27. Having clarified the factual position by taking the evidence on record, I now proceed to discuss the rival submissions of the parties.

28. The appellant claims that out of a sale consideration of Rs. 20,00,000/-, he received Rs.15,00,00/- in cash. According to him the balance outstanding was Rs.5,00,000/-. The fact that the actual sale consideration was 20 lakhs is also admitted by the respondent, as is evident from his brief synopsis which is supported by his affidavit. The relevant portion of the said brief synopsis has been extracted hereinabove in paragraph 16. Pertinently, in his supporting affidavit dated 30.09.2016, the respondent states:

"2. That the said brief synopsis on behalf of the respondent Sh. Bawa Singh has been drafted by my counsel at my instance and under my instructions and I have understood the meaning and implications of the facts set out and averments made therein in my vernacular and also in the vernacular in which it is written and say that the facts stated therein are correct and the same are not being reproduced herein for the sake of

brevity and in order to avoid repetition and are urged as part and parcel of this affidavit".

29. However, the sale deed Ex.CW1/DA, records the sale consideration as Rs.4,00,000/- only. As per the sale deed the said amount was paid to the appellant by two cheques of Rs. 2,00,000/- each. It is the defence of the accused that he had taken back the said two cheques of Rs.2,00,000/- each from the appellant. Therefore, even according to him, the said two cheques of Rs.2,00,000/- each were not encashed by the appellant or his wife. He claims that he had made payment of Rs.4,00,000/- in cash to the appellant. Pertinently, there is no receipt or acknowledgment produced by him evidencing payment of the said amount. The appellant had denied having received the said amount in cash. Apart from the respondent's ipse dixit, there is nothing to substantiate the said position. I agree with the submission of Ld. Counsel for the appellant that, had the amount of Rs.4,00,000/- been paid in cash by the respondent, he would have obtained a receipt for the same, since that was the disclosed consideration in the sale deed and he would not have put his sale deed in jeopardy by letting the said transaction of payment of cash go unacknowledged. Pertinent, the Ld. MM has also rejected this defence of the accused.

30. Pertinently, even the ADJ while rendering the judgment dated 14.11.2014 in CS.OS 01/2011 preferred by the appellant, has returned the finding that the defendant i.e, the respondent accused "has issued *consolidated cheque of Rs Five Lacs after receiving two cheques of Rs. Two lacs each. Hence, the sale deed executed by the plaintiffs in favour of the defendant in respect of the suit property is without any sale consideration.*

The defendant has failed to prove that he had paid the sale consideration amount in cash to the plaintiffs. Accordingly, both the issues are decided in favour of the plaintiffs and against the defendants." It is a different matter that the appellants suit was dismissed on the ground that the same was barred by limitation.

31. Despite finding the defence of the accused to be unbelievable, the Ld. Magistrate acquitted the respondent on account of an apparent discrepancy in the case of the appellant. Ld. MM held that out of the sale consideration of Rs.20,00,000/-, the complainant claimed to have received only 15,00,000/- in cash. Thus, the outstanding balance was Rs.5,00,000/-. Even then the complainant accepted two cheques - totaling to Rs.4,00,000/- only. The appellant had not disclosed as to how the remaining amount of Rs.1,00,000/- was sought to be recovered from the respondent accused. The Ld. MM also held that if the accused had been returned the two cheques of Rs.2,00,000/- , then why would he replace the same with a cheque of Rs.5,00,000/-. The complainant had claimed that the amount of Rs.1,00,000/- was towards the sale of building material lying on ground floor of the building in question. However, that fact was not stated in the sale deed, legal notice, or even in the complaint. The complainant had stated that the cheque of Rs.5,00,000/- was given to him when he was alone. However, CW2 Parvesh Sharma- the son of the complainant stated that the said cheque was given in his presence and in the presence of his mother and the younger brother.

32. Having considered the evidence brought on record, and the Brief Synopsis filed by the respondent along with his supporting affidavit dated

30.09.2016, in my view, the reasons recorded by the Ld. MM to disbelieve the complaint of the complainant are not germane.

33. It is evident that the parties had agreed to disclose consideration of Rs.4,00,000/- in the sale deed out of the total consideration of Rs.20 lakhs. This is evident from the sale deed itself, and from the fact that two cheques of Rs.2,00,000/- were drawn by the accused and shown before the sub Registrar. However, it appears that it was never the intention of the parties that the said cheques of Rs.2,00,000/- each would be delivered to the drawees and encashed by them. Admittedly, the said cheques were returned to the accused. Though he claims that he had made payment of Rs.4,00,000/- in cash, that story is completely unbelievable. As noticed above, the respondent has claimed in his Brief Synopsis that "the total *consideration of the property in question is Rs.20 lacs in which Rs.15 lacs has been paid in cash and on 12.3.2016 a sum of Rs.1 lac further in advance payment was made to the appellant just one day before the Registry and balance amount of Rs.4 lacs was paid by the respondent to the appellants by* way of the two cheques 2 lacs each". He is bound by this statement, duly supported by his affidavit. However, there is nothing to substantiate – not even probabalise, his stand that he had paid Rs.One Lakh in cash "on 12.03.2016" i.e. one day before the Registry. Pertinently, the Sale Deed was got registered on 14.03.2006. Thus, there is nothing to substantiate that the respondent had made any payment to the petitioner, other than the amount of Rs.15 lakhs. Thus, there is no inconsistency in so far as the case of the complainant is concerned that he has received Rs.15,00,000/- and had to receive the balance of Rs.5,00,000/-.

34. The respondent claimed to have issued the cheque in question to one Surender Kumar for clearing the electricity dues of the premises which, according to him, were to be cleared by the appellant. The explanation furnished by the respondent, to say the least, is absurd. If the appellant had to clear the said dues, there was no reason for the respondent to issue the cheque of Rs.5,00,000/- and leave it with Surender Kumar. The position would have been to the contrary. It is the appellant, who would have had to create a security in favour of the respondent to ensure that he clears the outstanding electricity dues. It is also pertinent to note that the Ld. MM has rejected the explanation furnished by the accused for issuance of the cheque of Rs.5,00,000/- which admittedly bears his signatures.

35. Thus, it is evident that the cheque of Rs.5,00,000/- was issued by the respondent towards the balance sale consideration. May be, the same was left with Surender Kumar, till such time as the appellant satisfies the respondent with regard to the apprehended outstanding electricity bills, whereafter, the balance payment of Rs.5,00,000/- was to be handed over to the appellant. Only this arrangement explains issuance of the said cheque of Rs.5,00,000/- by the respondent and its being handed over to a third party, namely, Surender Kumar – as claimed by the respondent.

36. Pertinently, the accused and his witnesses claimed that Surender Kumar had informed that he had handed over the cheque of Rs. 5,00,000/- given to him as security by respondent, to the appellant, after the registration of the documents. Thus, as per the defence of the accused, Surender Kumar breached the trust and faith in which the said cheque of Rs.5,00,000/- was delivered by him to Surender Kumar. Yet, no action of any nature was

taken by the respondent against Surender Kumar. No notice was issued to- either Surender Kumar, or to the appellant, claiming that the said cheque had unlawfully been delivered by Surender Kumar to the appellant. No demand was made by the respondent for return of the said cheque. Pertinently, no stop payment instructions were issued in respect of the said cheque to the bank, even after learning of its so called alleged unlawful delivery by Surender Kumar to the appellant.

37. The cross examination of DW1 and DW2 have exposed them as unreliable witnesses. DW1 stated that he had no personal interest regarding the dispute between the parties. He did not know the middleman Surender Kumar. He did not even know that Surender Kumar was a middleman. He was not present when the sale deed was registered in the office of the Registrar. He did not have any knowledge regarding the amounts of the sale/ purchase under the transaction. Similarly, DW2 stated that he had not seen the electricity bill amounting to Rs.22,00,000/-, allegedly raised by DESU towards the outstanding dues, himself. He had not seen any official from the electricity department visiting the property in question. Pertinently, the respondent neither examined himself, nor the said Surender Kumar to probabalise his defence.

38. The explanation furnished by the complainant that the amount of Rs.1,00,000/- was towards the sale of building material lying on the ground floor of the premises was not necessary to be gone into. As to how the parties decided on the consideration under the transaction, and what all went into it, is not the concern of the court. What is relevant and material is that the total sale consideration was Rs.20 lakhs.

39. The defence set up by the respondent accused is most implausible.

This court in Rajesh Agarwal v. State & Anr., 2010 VII AD (Delhi) 576 has observed as under:

"There is no presumption that even if an accused fails to bring out his defence, he is still to be considered innocent. If an accused has a defence against dishonour of the cheque in question, it is he alone who knows the defence and responsibility of spelling out this defence to the court and then proving this defences is on the accused".

40. As noticed above, the accused did not examine himself as his witness.

Thus, his statement recorded under Section 281/ 313 Cr PC cannot be read as a part of his evidence. In V.S. Yadav v. Reena, 2010 (4) JCC (NI) 323, this court observed:

"5. It must be borne in mind that the statement of accused under Section 281 Cr. P.C. or under Section 313 Cr. P.C. is not the evidence of the accused and it cannot be read as part of evidence. The accused has an option to examine himself as a witness. Where the accused does not examine himself as a witness, his statement under Section 281 Cr. P.C. or 313 Cr. P.C. cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused was truthful. In the present case, the accused in his statement stated that he had given cheques as security. If the accused wanted to prove this, he was supposed to appear in the witness box and testify and get himself subjected to cross examination. His explanation that he had the cheques as security for taking loan from the complainant but no loan was given should not have been considered by the Trial Court as his evidence and this was liable to be rejected since the accused did not appear in the witness box to dispel the presumption that the cheques were

issued as security. Mere suggestion to the witness that cheques were issued as security or mere explanation given in the statement of accused under Section 281 Cr. P.C., that the cheques were issued as security, does not amount to proof. Moreover, the Trial Court seemed to be obsessed with idea of proof beyond reasonable doubt forgetting that offence under Section 138 of N.I. Act was a technical offence and the complainant is only supposed to prove that the cheques issued by the respondent were dishonoured, his statement that cheques were issued against liability or debt is sufficient proof of the debt or liability and the onus shifts to the respondent/ accused to show the circumstances under which the cheques came to be issued and this could be proved by the respondent only by way of evidence and not by leading no evidence". (emphasis supplied)

41. In G.L. Sharma v. Hemant Kishore, Cr. A No.1400/2011 decided by

this court in 13.01.2015, this court, inter alia, observed:

"11. Once the cheque relates to the account of the accused and he accepts and admits the signature on the said cheque then initial presumption as contemplated under Section 139 of the Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption. What is required to be established by the accused in order to rebut the presumption is different from each case under given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttable evidence. In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the Court... ...". (emphasis supplied)

42. In a later part of the judgment, the learned Single Judge has observed:

"11. ... ... Section 139 of the 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. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. Reverse onus clauses usually impose an evidentiary burden. It is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail".

"12. ... ... as observed by Supreme Court in K.N. Beena vs. Muniyappan & Anr. , (2001) 8 SCC 458 and M.M.T.C. Ltd. and Anr. vs. Medchl Chemicals & Pharma (P) Ltd. and Anr., (2002) 1 SCC 234 there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondent. This they have to discharge at the trial. None of the respondent stepped in the witness box so as to subject themselves to cross-examination. Although it is not incumbent upon the accused to examine himself/herself in order to discharge the burden of proof and he/she may discharge the burden on the basis of the material already brought on record. However, the accused have failed to discharge the burden and rebut the presumption as discussed above... ...". (emphasis supplied)

43. The above extracted observations made by the Courts squarely apply in the facts of the present case.

44. Learned counsel for the respondent has, firstly, relied upon the order ***passed by this court in Saj Properties Pvt. Ltd. v. Virender Dagar, 2015 Cri*** LJ 2772. Pertinently, this was an order rejecting the petitioner's leave

petition to seek leave to appeal against the acquittal of the respondent/ accused in the complaint under Section 138 of the NI Act. In that case, in the complaint as well as in the pre-summoning evidence/ examination in chief, the petitioner did not disclose as to on what account the legally recoverable debt had arisen. It was only in the legal notice issued by the complainant, he stated that the accused had taken a friendly loan and that in discharge thereof the cheque of Rs.12 lakhs had been issued.

45. In my view, the said decision is of no avail to the respondent, since it has been the consistent claim of the appellant that the cheque in question was issued towards discharge of the liability of Rs.5 lakhs payable under the sale transaction.

46. Reliance is also placed by Mr. Dudeja on K. Prakashan v. P.K. Surendran, Crl A No.1410/2007 decided on 10.10.2007 by the Supreme Court of India. Reliance is particularly placed on paras 13 and 20 of this decision. Paragraph 13 holds that, whereas the standard of proof so far as the prosecution is concerned is to prove the guilt beyond reasonable doubt; the defence of the accused has to be established on mere preponderance of probability.

47. There can be no quarrel with the aforesaid proposition. It will have to be examined from case to case as to whether the accused has set up a probable defence.

48. In para 20 of this decision, the Supreme Court held that the appellate court shall not reverse the judgment of acquittal, only because another view is possible to be taken. Once again, there can be no quarrel with this

proposition. However, if the appellate court finds that the judgment of acquittal rendered by the Trial Court is a result of misappreciation of evidence brought on record and is not premised on the correct legal principles, and the view taken by the Trial Court is not one of the possible views which could be taken in the particular case, the appellate court is duty bound to exercise its appellate jurisdiction and interfere in the matter in the interest of justice. It is well settled that just as it is necessary to ensure that no one is unjustifiably punished, it is equally important- to maintain the rule of law, to ensure that the guilty do not go unpunished.

49. Mr. Dudeja has also invoked the doctrine of pari delicto invoked by ***the court in Virender Singh v. Laxmi Narayan & Anr., Crl Rev Pet*** No.106/2005 decided by the court on 01.11.2006. In my view, the said doctrine cannot be pressed into service, since the consideration payable by the accused was not in respect of an unlawful agreement. The agreement, namely, the sale of the property is not prohibited by law. The mutual agreement between the parties to disclose only a part of the consideration under the sale deed may attract other consequences for the parties. However, that by itself does not render the underlying transaction unlawful. Pertinently, it is not claimed that at the relevant time, there was a bar to payment of consideration in cash and the said bar had the effect of invalidating the transaction.

50. In the aforesaid light, I am of the considered view that the appellant has proved beyond all reasonable doubt that the cheque in question was issued by the accused in discharge of a legally recoverable debt. It has also proved that the said cheque has been dishonoured upon presentation and,

despite issuance of statutory notice of demand within the period of limitation, the amount has not been paid by the accused. The defence set up by the accused has not been probablised and he has not been able to create any doubt in the mind of the Court that the said cheque was not issued towards discharge of a legally recoverable debt. The respondent accused has not been able to rebut the presumption arising in favour of the appellant holder of the cheque. Consequently, the impugned judgment is set aside and the respondent accused is held guilty for commission of the offence under Section 138 of the Negotiable Instruments Act. Accordingly, he stands convicted of the offence under Section 138 of the Negotiable Instruments Act.

(VIPIN SANGHI) JUDGE JULY 09, 2018