2024 INSC 1059

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRIMINAL) NOS. 13981-13985 OF 2024

[@ DIARY NO.52267 OF 2023]

M/S S. S. PRODUCTION AND ANR. …PETITIONERS

P1: M/S S. S. PRODUCTION

P2: TR. S. SUBBIAH

VERSUS

TR. PAVITHRAN PRASANTH …RESPONDENT

J U D G M E N T

AHSANUDDIN AMANULLAH, J.

Delay condoned.

2. The present petition assails the common Final Judgment and Order dated 15.06.2023 in Crl. R. C. Nos.394-396, 403 & 406 of 2020 (hereinafter referred to as the 'Impugned Order') passed by the High Court of Judicature at Madras (hereinafter referred to as the 'High Court'), whereby the five Criminal Revision cases filed by the petitioners were dismissed and the conviction and sentence, as awarded by

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Reason:

separate Judgments and Orders dated 31.10.2017 passed by the Metropolitan Magistrate (Fast Track Court III), Saidapet, Chennai (hereinafter referred to as the 'Trial Court') in C.C. Nos.137-141 of 2016 and confirmed by separate Judgments and Orders dated 31.10.2019 passed by the VII Additional Sessions Judge, City Civil Court, Chennai (hereinafter referred to as the 'First Appellate Court') in Crl. A. Nos.380-384 of 2017, were upheld.

BRIEF FACTS:

3. The sole respondent is the complainant. The petitioner no.2 is the proprietor of petitioner no.1 and both are arrayed as accused. It was alleged that the petitioner no.2 was in the business of Cinema Production and for his urgent business needs, he had approached the complainant and borrowed a total sum of Rs.41,28,000/- (Rupees Forty-One Lakhs Twenty-Eight Thousand) in five instalments as a hand loan on 29.08.2015 and promised to repay the same on demand with interest at the rate of 2% per month. Separate Promissory Notes dated 29.08.2015 were executed for each of the instalments in favour of the complainant.

4. In order to discharge the liability of Rs.42,08,000/- (Rupees Forty-Two Lakhs Eight Thousand), a total of five cheques were issued by the accused, which on being presented by the complainant, were returned with the endorsement '*funds insufficient*'. Statutory Notice was issued by

the complainant pursuant to which he lodged five complaints in respect of the five dishonoured cheques against the petitioners. The Trial Court convicted the accused under Section 138[1] of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'Act') and sentenced them to six months of Simple Imprisonment and to pay the cheque amounts as compensation, in each of the complaints. This order of conviction and sentence has been upheld by the First Appellate Court and thereafter by the High Court *vide* the Impugned Order.

5. The details of the five cases are tabulated hereinunder:

Date of Loan	29.08.2015				
Loan Amount	Rs.41,28,000 with interest @ 2% *per mensem*				
Cheque Date	29.09.2015				
Drawn On	South Indian Bank, Gandhipuram, Coimbatore Branch				
Cheques No.	500834	500830	500831	500832	500833
Cheque Amounts [*In Rs.*	1.28	10.2 each x 4 cheques = 40.8			

[1] '***138. Dishonour of cheque for insufficiency, etc., of funds in the account***.—*Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:*
Provided that nothing contained in this section shall apply unless—
(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.
Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.'

***(Lakhs)*]**					
Total Cheque Amount	Rs.42,08,000 (*inclusive of interest*)				
Date Cheque presented	29.09.2015	15.10.2015			
Date Cheque returned	29.09.2015	16.10.2015			
Returned with Endorsement	'*Funds Insufficient*'				
Date of Legal Notice	07.10.2015	12.11.2015			
Date Postal Cover returned	19.11.2015	24.11.2015	26.11.2015		
Postal Cover returned as	'*Unclaimed*'				
Complaint CC ___/2016	137	138	139	140	141
Crl. A. No. ___/2017	380	381	382	383	384

SUBMISSIONS BY THE PETITIONERS:

6. Learned counsel for the petitioners submitted that the cheque(s) must be proved to have been issued for a legally enforceable debt, but in the present cases, the complainant has not produced any statement of accounts and/or Income Tax Returns showing that the complainant lent money to the accused and the accused did not repay the said money.

Hence, the complainant failed to prove that the cheques were issued for a legally enforceable debt.

7. It was contended that the complainant claims that he lent cash of Rs.41,28,000/- (Rupees Forty-One Lakhs Twenty Eight Thousand) to the accused with rate of interest of 2% per month. However, the matter of fact is that the said money was given to the accused in the course of producing a film jointly by the complainant and the accused and since the film failed, the cheques and receipts given by the accused were misused by the complainant. Further, the complainant failed to establish that the amount given by the complainant is a loan and not for any other purpose by placing the statement of accounts and/or Income Tax Returns. Hence, the complaint would not attract Section 138 of the Act as the accused has rebutted the presumption under Sections 118 and 139 of the Act by probable defence. This defence has been established by cross-examining PW1/the General Power of Attorney-holder of the complainant. Accordingly, the accused had shifted the burden on the complainant. Hence, the statutory presumption under Section 139 of the Act would not continue and it was for the complainant to discharge the onus by bringing on record evidence/material to show that the amount(s) given is/are for a legally enforceable debt. Moreover, the complainant failed to assail the defence of the accused. On these grounds, learned

counsel for the petitioners urged the Court to issue notice and thereafter, admit and allow the appeals.

ANALYSIS, REASONING AND CONCLUSION:

8. From the order impugned, it is clear that though the contention of the petitioners was that the said amounts were given for producing a film and were not by way of return of any loan taken, which may have been a probable defence for the petitioners in the case, but rightly, the High Court has taken the view that evidence had to be adduced on this point which has not been done by the petitioners. Pausing here, the Court would only comment that the reasoning of the High Court as well as the First Appellate Court and Trial Court on this issue is sound. Just by taking a counter-stand to raise a probable defence would not shift the onus on the complainant in such a case for the plea of defence has to be buttressed by evidence, either oral or documentary, which in the present cases, has not been done. Moreover, even if it is presumed that the complainant had not proved the source of the money given to the petitioners by way of loan by producing statement of accounts and/or Income Tax Returns, the same *ipso facto,* would not negate such claim for the reason that the cheques having being issued and signed by the petitioners has not been denied, and no evidence has been led to show that the respondent lacked capacity to provide the amount(s) in question.

In this regard, we may make profitable reference to the decision in ***Tedhi Singh v Narayan Dass Mahant*, (2022) 6 SCC 735**:

> '***10.*** *The trial court and the first appellate court have noted that in the case under Section 138 of the NI Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the NI Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent, the courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross-examination of the witnesses of the complainant. Ultimately, it becomes the duty of the courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.*'
>
> (emphasis supplied)

9. The High Court has also rightly noted that the petitioners have not denied receipt of the sum of Rs.41,28,000/- (Rupees Forty-One Lakhs Twenty-Eight Thousand) but have taken the defence that it was given in the course of jointly producing a film with the complainant. Even then, the liability has to be discharged by the person(s) concerned and that would

be a legally enforceable debt repayable, under the purview of Section 138 of the Act.

10. Moreover, as per the defence proffered by the petitioners themselves, the money was given to the accused in the course of producing a film jointly by the complainant. The accused urge that since the film failed, the cheques and receipts given by the accused were misused by the complainant. Thus, *arguendo*, if the same is correct, and the accused and respondent-complainant were indeed jointly producing a film, no reason/occasion to issue the cheques and receipts to the complainant is forthcoming, inasmuch as, if the amount(s) were by way of investments in a film being jointly produced, the need *per se* to issue cheques, including interest would not have arisen at all. This crucial aspect has not been explained by the petitioners at all.

11. Further, the High Court has also rightly observed that even assuming the petitioners and the complainant engaged together in film production and were in the course of jointly producing a film, the fact that the transaction occurred as a joint investment has not been substantiated by the petitioners before the Courts. In this background, the onus to first prove as to how the amount that is said to have been given by the complainant to the petitioners could have been given, would not be fatal as receipt of the amount(s) has not been denied, much less

disputed by the petitioners. In this regard, specifically, a suggestion given to the GPA-holder of the complainant i.e., PW1 that the complainant and petitioners were engaged in film production has been emphatically denied by PW1.

12. We also find no error in the High Court opining that in the backdrop of emphatic denial by PW1 with regard to any joint deal/venture with the petitioners in film production and acceptance and non-rebuttal of receipt of Rs.41,28,000/- (Rupees Forty-One Lakhs Twenty-Eight Thousand), the onus would not shift on the complainant and would remain on the petitioners to prove that such receipt of money was not with regard to repayment of an amount legally due to the complainant. In fact, the accused have not been able to dislodge the statutory presumption under Section 139 of the Act. In this context, in a decision of recent vintage, ***Rajesh Jain v Ajay Singh*****, (2023) 10 SCC 148**, the Court stated:

> '***33.*** *The NI Act provides for two presumptions : Section 118 and Section 139. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that "unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability". It will be seen that the "presumed fact" directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138. [The rules discussed hereinbelow are common to both the presumptions under Section 139 and*

Section 118 and are hence, not repeated—reference to one can be taken as reference to another]

34. *Section 139 of the NI Act, which takes the form of a "shall presume" clause is illustrative of a presumption of law. Because Section 139 requires that the Court "shall presume" the fact stated therein, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary as is clear from the use of the phrase "unless the contrary is proved".*

35. *The Court will necessarily presume that the cheque had been issued towards discharge of a legally enforceable debt/liability in two circumstances. Firstly, when the drawer of the cheque admits issuance/execution of the cheque and secondly, in the event where the complainant proves that cheque was issued/executed in his favour by the drawer. The circumstances set out above form the fact(s) which bring about the activation of the presumptive clause. [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal, (1999) 3 SCC 35]]*

36. *Recently, this Court has gone to the extent of holding that presumption takes effect even in a situation where the accused contends that a blank cheque leaf was voluntarily signed and handed over by him to the complainant. [Bir Singh v. Mukesh Kumar [Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197: (2019) 2 SCC (Civ) 309: (2019) 2 SCC (Cri) 40]]. Therefore, mere admission of the drawer's signature, without admitting the execution of the entire contents in the cheque, is now sufficient to trigger the presumption.*

37. *As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.*

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39. *The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of "preponderance of probabilities", similar to a defendant in a civil proceeding. [Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441: (2010) 4 SCC (Civ) 477: (2011) 1 SCC (Cri) 184: AIR 2010 SC 1898]]*

40. In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words "until the contrary is proved" occurring in Section 139 do not mean that the accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist. [Basalingappa v. Mudibasappa [Basalingappa v. Mudibas appa, (2019) 5 SCC 418: (2019) 2 SCC (Cri) 571: AIR 2019 SC 1983]; see also Kumar Exports v. Sharma Carpets [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513: (2009) 1 SCC (Civ) 629: (2009) 1 SCC (Cri) 823]]

41. *In other words, the accused is left with two options. The first option—of proving that the debt/liability does not exist—is to lead defence evidence and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case. The preponderance of probability in favour of the accused's case may be even fifty-one to forty-nine and arising out of the entire circumstances of the case, which includes: the complainant's version in the original complaint, the case in the legal/demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his Section 313 CrPC statement or at the trial as to the circumstances under*

which the promissory note/cheque was executed. All of them can raise a preponderance of probabilities justifying a finding that there was "no debt/liability". [Kumar Exports v. Sharma Carpets [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513: (2009) 1 SCC (Civ) 629: (2009) 1 SCC (Cri) 823]]

42. *The nature of evidence required to shift the evidential burden need not necessarily be direct evidence i.e. oral or documentary evidence or admissions made by the opposite party; it may comprise circumstantial evidence or presumption of law or fact.*

43. *The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift to the complainant. It is open for him to also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact. In Kundan Lal case [Kundan Lal Rallaram v. Custodian (Evacuee Property), 1961 SCC OnLine SC 10: AIR 1961 SC 1316] when the creditor had failed to produce his account books, this Court raised a presumption of fact under Section 114, that the evidence, if produced would have shown the non-existence of consideration. Though, in that case, this Court was dealing with the presumptive clause in Section 118 NI Act, since the nature of the presumptive clauses in Sections 118 and 139 is the same, the analogy can be extended and applied in the context of Section 139 as well.*

44. *Therefore, in fine, it can be said that once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption "disappears" and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his complaint case. Thereafter, the presumption under Section 139 does*

> *not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. [Basalingappa v. Mudibasappa [Basalingappa v. Mudibas appa, (2019) 5 SCC 418: (2019) 2 SCC (Cri) 571: AIR 2019 SC 1983]; see also, Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441: (2010) 4 SCC (Civ) 477: (2011) 1 SCC (Cri) 184: AIR 2010 SC 1898]]*'
>
> (emphasis supplied)

13. For reasons aforesaid, we do not find any ground to interfere in the order impugned and accordingly, the petition(s) shall stand dismissed. We refuse special leave, being cognizant of ***Rafiq v State of Uttar Pradesh*, (1980) 4 SCC 262**:

> '***3.*** *Concurrent findings of fact ordinarily acquire a deterrent sanctity and tentative finality when challenged in this Court and we rarely invoke the special jurisdiction under Article 136 of the Constitution which is meant mainly to correct manifest injustice or errors of law of great moment.* *…*'
>
> (emphasis supplied)

14. However, before parting, the Court would clarify that though there are separate judgments and orders of the Trial Court, in each case, six months' simple imprisonment and direction to pay the cheque amount as the compensation has been awarded; the orders being of the same date between the same parties and in connection with the same transaction of the same nature, albeit in different tranches, the sentences of imprisonment awarded shall run concurrently. Further, in case of failure of the petitioners to pay the compensation amount within six months from

today, the same shall be recovered from them as a public debt under the relevant law, and it shall be paid to the complainant/respondent by the competent authority post-recovery. In directing the sentences to run concurrently, we have exercised judicial discretion [reference to 'judicial discretion' herein is to be understood as per ***Gudikanti Narasimhulu v Public Prosecutor, High Court of Andhra Pradesh*****, (1978) 1 SCC 240**] guided by the principles governing the field, which are noted *infra*:

I. ***Mohd. Akhtar Hussain v Assistant Collector of Customs (Prevention)*****, (1988) 4 SCC 183** [2-Judge Bench]

> '***10.*** *The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.*'
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> (emphasis supplied)

II. ***V K Bansal v State of Haryana*****, (2013) 7 SCC 211** [2-Judge Bench]

> '***18.*** *Applying the principle of single transaction referred to above to the above fact situations we are of the view that each one of the loan transactions/financial arrangements was a separate and distinct transaction between the complainant on the one hand and the borrowing company/appellant on the other. If different cheques which are subsequently dishonoured on presentation, are issued by the borrowing company acting through the*

appellant, the same could be said to be arising out of a single loan transaction so as to justify a direction for concurrent running of the sentences awarded in relation to dishonour of cheques relevant to each such transaction. That being so, the substantive sentence awarded to the appellant in each case relevant to the transactions with each company referred to above ought to run concurrently. We, however, see no reason to extend that concession to transactions in which the borrowing company is different no matter the appellant before us is the promoter/Director of the said other companies also. Similarly, we see no reason to direct running of the sentence concurrently in the case filed by State Bank of Patiala against M/s Sabhyata Plastics and M/s Rahul Plastics which transaction is also independent of any loan or financial assistance between the State Financial Corporation and the borrowing companies. We make it clear that the direction regarding concurrent running of sentence shall be limited to the substantive sentence only. The sentence which the appellant has been directed to undergo in default of payment of fine/compensation shall not be affected by this direction. We do so because the provisions of Section 427 CrPC do not, in our opinion, permit a direction for the concurrent running of the substantive sentences with sentences awarded in default of payment of fine/compensation.'

(emphasis supplied)

III. ***O M Cherian v State of Kerala*, (2015) 2 SCC 501** [3-Judge Bench]

'***18.*** *While referring the matter to a larger Bench, the Bench observed that in Mohd. Akhtar Hussain case [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183: 1988 SCC (Cri) 921], Section 31 CrPC was not noticed by this Court. It is to be pointed out that in Mohd. Akhtar Hussain case [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183: 1988 SCC (Cri) 921] and Manoj case [(2014) 2 SCC 153: (2014) 1 SCC (Cri) 763], the appellants who were convicted for different counts of offences arose out of a single transaction, favouring the exercise of discretion to*

the benefit of the accused that the sentences shall run concurrently. Those decisions are not cases arising out of conviction at one trial of two or more offences and therefore, reference to Section 31 CrPC in those cases was not necessitated.

19. *As pointed out earlier, Section 31 CrPC deals with quantum of punishment which may be legally passed when there is (a) one trial; and (b) the accused is convicted of two or more offences. The ambit of Section 31 is wide, covering not only a single transaction constituting two or more offences but also offences arising out of two or more transactions. In the two judgments in Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183: 1988 SCC (Cri) 921] and Manoj [(2014) 2 SCC 153: (2014) 1 SCC (Cri) 763], the issue that fell for consideration was the imposition of sentence for two or more offences arising out of the single transaction. It is in that context, in those cases, this Court held that the sentences shall run concurrently.*

20. *Under Section 31 CrPC it is left to the full discretion of the court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. The discretion has to be exercised along the judicial lines and not mechanically.*

21. *Accordingly, we answer the reference by holding that Section 31 CrPC leaves full discretion with the court to order sentences for two or more offences at one trial to run concurrently, having regard to the nature of offences and attendant aggravating or mitigating circumstances. We do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, if the court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the*

> *court may direct.* *We also do not find any conflict in the earlier judgment in Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183: 1988 SCC (Cri) 921] and Section 31 CrPC.*'
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> (emphasis supplied)

15. Exemption from surrendering granted earlier *vide* Order dated 03.05.2024 in favour of petitioner no.2 will cease to operate. The petitioner no. 2 is hereby directed to surrender within three weeks from the date of communication of this Judgment to serve the remaining period of sentence. Registry shall intimate the petitioners and their AOR forthwith.

16. Pending IA(s), if any, stand closed.

…….....J.
[SUDHANSHU DHULIA]

…….....J.
[AHSANUDDIN AMANULLAH]

NEW DELHI
1st OCTOBER, 2024