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

\+ CRL.L.P. 93/2012

KAMLA DEVI ..... Petitioner

Through: Mr.Vijay Shankar, Advocate

versus

STATE & ORS ..... Respondents

Through: Ms.Rajni Gupta, APP for the State/ R-1.
None for R-2.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

<u>O R D E R</u>

% **11.05.2016**

1. The present leave petition has been filed by the petitioner seeking leave to appeal against the order dated 23.06.2011 passed by learned MM whereby accused/respondent No.2 has been acquitted of the charge under Section 138 NI Act.

2. I have heard learned counsel for the petitioner and carefully gone through the record.

3. The complaint case filed by the petitioner/complainant has been dismissed by the learned MM for the reasons recorded in paras 8 to10 of the judgment, which are extracted hereunder:-

> *'8. U/s 139 of NI Act there is a legal presumption that the holder of the cheque received the cheque for discharge of any debt or liability, in part or in whole. In Ranagappa v. Sri Mohan (2010 AIAR (Crl.) 584) Hon'ble Supreme Court has held that the presumption mandated by section 139 of NI Act*

includes the existence of a legally enforceable debt or liability. However, this is an initial presumption which is in the nature of rebuttable presumption and it is open to the accused to raise a defence wherein he existence of a legally enforceable debt or liability can be contested.

9. Even though there is a presumption U/s 139 of NI Act, after the examination of witnesses and cross examination, the Court is of the view that the complaint has not been able to prove her case. In fact there are discrepancies in the complaint and cross examination which can not be ignored Complainant has stated in her affidavit that she gave loan to the complainant @ 18% as interest, but no agreement has been executed or brought on record. Complainant has not been able to show how her husband and the accused were related in business. No business relation has been shown. Also the accused was running business in style of Continental Engineering Construction but complainant's husband ran a grocery shop. How the complainant's husband and the accused undertook business, has not been shown. Both the cheques were issued within a span of 10 days for ₹2,00,000/- each which is highly unlikely. The Ex.CW2/D1 was signed by three persons but not accused, who actually took the loan as averred. How the loan amount was arranged, has not been shown by the complainant. If cheque was issued on spot by the accused, how is it possible that there is a writing in two inks on the cheques. These questions have not been answered by the complainant and raise doubt. Even DW-1 has stated that the handwriting on the cheques was not of the accused.

10. For the above stated reasons, the accused is not found guilty for the offence U/s 138 on NI Act.'

4. The complaint case No.1375/2011 has been filed by the petitioner/complainant, who is a house wife, alleging that her husband and respondent/accused are well known to each other and both of them are engaged in business. In April, 2002 respondent/accused was in need of

money for his domestic requirement and promoting his business. At the request of respondent/accused as well her husband, the complainant advanced loan of ₹ 4 lacs on 14.04.2002 in cash. At the time of receiving the said amount of ₹4 lacs, respondent/accused issued two post-dated cheques No.402264 dated 10.08.2002 and 402265 dated 20.08.2002 for a sum of ₹2 lacs each. On presentation, the said cheques were dishonoured.

5. During the course of hearing, learned counsel for the petitioner has been specifically questioned about any documentary evidence filed alongwith the complaint case to show the source of money or that the complainant was having ₹ 4 lacs in her account which was withdrawn to give advance to respondent/accused and whether the transaction was reflected in her income tax return. Learned counsel for the petitioner has been further question that if there was a business relation between her husband and respondent/accused then how she came into picture to advance ₹ 4 lacs in cash especially when she is a house wife only. Learned counsel for the petitioner/complainant has fairly conceded that there is no documentary evidence about the source of cash of ₹ 4 lacs and it being given to the respondent/accused as advance by the petitioner.

6. In the decision reported as ***L.Raju vs. Gurappa Reddy*** 2016(1) Crimes 26 (Karnt.) the facts were identical to the extent that the complainant claimed to have advanced a hand loan of ₹ 6 lacs to the accused in the month of January, 2006 and there was no documentary evidence for having advanced the said amount. In the report, it was held as under:-

> *'At the outset, it has to be stated that all the necessary conditions to file a complaint for the offence punishable under Section 138 of NI Act have been duly complied with. There is no dispute between the parties in that regard. What has been disputed by the accused is that the cheques in question were not*

issued by the accused to the complainant towards the discharge of legally recoverable debt. It is the case of the accused that he had never taken hand loan of ₹6,00,000/- from the complainant nor he issued the two cheques referred to by the complainant in favour of the complainant. Since the accused has admitted his signatures on both the cheques, at the most, presumption can be drawn under Section 139 of the NI Act that the cheques were issued towards the discharge of legal liability. But the presumption under Section 139 of NI Act is a rebuttable presumption. Accused can rebut the presumption by leading evidence or from the evidence placed on record by the complainant. The accused need not prove his case beyond reasonable doubt. The burden to be discharged by an accused is that of a plaintiff or defendant in a civil suit i.e. preponderance of probability. Further it has to be stated that the presumption under Section 139 of the NI Act is presumption as to legally recoverable debt. ***But there is no presumption as to the existence of debt and liability of the accused towards the complainant is to be established by the complainant by cogent and convincing evidence. It is in this background, the evidence placed on record by the parties will have to be appreciated.'***

7. In the instant case, since the petitioner/complainant has failed to discharge the onus of existence of debt or liability, the learned Trial Court has rightly dismissed the complaint filed under Section 138 NI Act.

8. The leave petition is dismissed.

PRATIBHA RANI, J.

MAY 11, 2016
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