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

\+ CRL.L.P. 565/2016

RAMESH SETH

..... Petitioner

Through: Mr. Vijaiender Nigam and Neeraj Shrotriya, Adv.

versus

SMT ASHA GUPTA & ORS

..... Respondent

Through: Ms. Anita Abraham, APP

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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

% **24.10.2016**

<u>Crl.M.A. No.16525/2016</u>

Exemption allowed, subject to all just exceptions. The application stands disposed of.

<u>CRL.L.P. 565/2016 & Crl.M.A. No.16526/2016</u>

The petitioner has preferred the aforesaid leave petition to seek leave to appeal against the judgment dated 21.07.2016 passed by the MM-T (NE), Karkardooma Courts in CC No.47986/2015, whereby the complaint of the petitioner under Section 138 of the Negotiable Instruments Act has been dismissed and the respondent/ accused acquitted. The petitioner has preferred the aforesaid application to seek condonation of 60 days delay in filing the leave petition.

Since I have heard learned counsel for the petitioner on merits on the leave petition and I am not inclined to issue notice, no useful purpose would be served in issuing notice in the delay application.

According to the petitioner/ complainant, he advanced a friendly loan of Rs.6 lacs to the respondent. The respondent issued the cheque in question for Rs.5.25 lacs towards the remaining amount of the said loan, since Rs.75,000/- had been repaid by the accused in cash. When the said cheque was deposited, it was dishonoured. The respondent did not pay the amount despite issuance of a statutory notice and consequently the complaint came to be filed.

The transaction between the parties was not evidenced by any document or by any other independent witness. The petitioner did not establish the availability of the amount of Rs.6 lacs in cash as the said amount was not shown as cash in hand in the account of the petitioner. The petitioner also did not reflect the advancement of loan of Rs.6 lacs to the respondent in the income tax return contemporaneously filed at the time when the loan was allegedly advanced. So far as the defence of the accused is concerned, the same was that the father of the petitioner was running a chit fund business and the cheque in question had been given in blank since the petitioner had participated in the chit business. The fact that the accused had participated in the chit business run by the petitioner's father was admitted by the petitioner. In this background, the Trial Court found that the defence set up by the accused was probablised and, consequently, the accused was acquitted.

The submission of learned counsel for the petitioner is that since the accused had admitted his signatures on the cheque in question, the presumption arose in favour of the complainant under Section 139 of the Negotiable Instruments Act, and the onus lay upon the accused to show that the cheque had not been issued in respect of an outstanding debt or other liability.

The circumstances taken note of herein above, in my view, were correctly accepted by the Trial Court as disclosing a probable defence by the accused. The relevant discussion in the impugned judgment is found in the following passage from the impugned judgment, which reads as follows:

> *"30. In the present case also, the complainant had allegedly made payment of a huge amount of Rs. 6 lacs to the accused without executing any document, without taking any security and without charging any interest. The complainant has failed to prove that he has sufficient capacity to give such a heavy loan to a person who are just known to him as they were residing in the same locality and accused was a member of a chit fund company run by father of the complainant. The complainant does not know as to what was his income at the relevant time. No ITRs have been filed to show that the complainant was heaving sufficient financial means to pay a loan of Rs. 6 lacs to the accused as contended.*
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> *31. During cross examination as CW-1, the complainant has admitted that his father was running a Chit Fund Company. He has also admitted that he was also a Director in the said company. He has further admitted that at present he is running the company after the death of his father and that he has control over the affairs of the company. It has also been proved on Court record that the accused was a member of the above said Chits Fund Company and she has already settled her account.*
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> *32. The contention of the accused is that she had handed over the cheque to the Chit Fund Company as security being its member. The cheque was a blank signed cheque towards security. Even though, the accused does not have any document*

to show that she was given the cheque in question as security to the Chit Fund Company, the entire circumstances of the case creates doubts on the alleged loan transaction.

33. The husband of the accused has made the allegations in his examination that the complainant has filed the present case just to harass them and to avoid the liability of paying Rs. 4 lacs to him for a committee which he is entitled to recover. However, there is no evidence on Court record except the self serving averment of the witnesses DW-5 and DW-3 who are interested witnesses to prove that Naresh Chand Gupta was a member of any such committee as contended. During his cross examination, they have admitted that they have any document to prove that they were member of the committee run by the complainant. Therefore, this part of the evidence cannot be considered to be proved.

34. Be that as it may, the fact remains that it is the complainant who has to prove beyond reasonable doubts his case, once the accused discharges the initial burden by showing the shortcomings in the material produced by the complainant. As discussed herein above, it is the complainant who must have some documentary evidence in his possession to prove beyond - reasonable doubts that he had advanced a loan of Rs. 6 lacs to the accused. Even though, the material on record shows on the balance of probabilities that the complainant and accused are known to each other, there appears no friendly relationship between them. The material on record suggests only a financial relationship between the accused and the complainant as accused was a member of a Chit Fund Company run by the complainant and his father. It is not sufficient to prove that the relationship between them are so closed so as to permit the complainant to give a loan of Rs. 6 lacs in cash to the accused without executing of any document. As per the complainant himself, the cheque in question was not taken by him at the time of advancing a such loan. Thus, even a security cheque was also not taken by him from the accused at the time of advancing such a heavy loan amount. There is nothing on Court record to explain this defect in the theory of the complainant.

35. Further, Rs. 6 lacs is a heavy amount. The complainant does not have any documentary evidence to prove his capacity to pay loan of Rs. 6 lacs. As per the complainant, he had paid an amount which he had received from a property transaction. However, no document of the said transaction has been brought on record. No independent witness has been examined to prove that the complainant had received an amount of Rs. 6.5 lacs in cash during the relevant period. There is a reasonable doubt have been created on his capacity to pay such a heavy loan to the accused.

35. Further, as per the complainant he had given the loan to the accused and her husband during the month of January 2011. The accused has examined witness DW-2 from Bank of Baroda. The witness has brought on Court record the statement of account of Ms. Asha Gupta, accused herein which is exhibited as Ex. DW2/2, certificate under Section 2(8)(a) of the Bankers Books Evidence Act 1891 and under Section 6(1) of Bankers Books Evidence Act 1891, which is exhibited as Ex. DW2/4. The statement has been duly proved. In this statement, Rs. 12 lacs are shown to be deposited on 10.06.2010 which was withdrawn on 15.02.2011. Thus, the accused has proved beyond reasonable doubts that during January 2011, she was having Rs. 12,20,000/- in her bank account. Therefore, there does not appear any financial crises so as to make the accused approach the complainant for any financial help. Therefore, the burden was on the complainant to prove beyond reasonable doubts that accused in need of money during the relevant period. However, there is no such evidence on Court record.

37. DW-4 has stated that accused was a member of Chit Fund Company as above said. During his cross examination he has stated that his company had never taken any cheque as security from its members. However, he appears to be an interested witness as he is Director of the said company in which the complainant is also a Director and he is relative of the complainant. Despite opportunities he had failed to bring the agreement which was signed by the accused with M/s Love Sweet Chits Fund Pvt. Ltd. Therefore, reasonable doubts have been created on his testimony also.

38. In view of the discussion herein above, I hold that the complainant has failed to prove beyond reasonable doubts that he had given a loan of Rs. 6 lacs to the accused. Therefore, he has failed to prove beyond reasonable doubts that accused was liable to pay Rs. 6 lacs to him on the date of presentation of cheque. I have studied the judgments relied upon by the complainant. However, they are distinguishable on facts. The ratio of those judgments do not support the case of the complainant. The judgment of Calcutta High Court is related to a revision petition which was filed by the petitioner against an order whereby Ld. CJM had taken cognizance of offence under Section 138 N.I. Act. Therefore, this judgment is not an appeal against any judgment. Further, Anjali Kukkar vs. M.M. Lal Chhabra (supra) is also distinguishable on facts.

39. In view of the discussion herein above, the benefit of doubts is given to the accused as per law. Accused cannot be held liable for an offence under Section 138 N.I. Act in the absence of sufficient evidence to prove the guilt of the accused beyond reasonable doubts".

The impugned judgment, therefore, does not call for inference. The petition is, accordingly, dismissed.

VIPIN SANGHI, J

OCTOBER 24, 2016

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