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

\+ CRL.L.P. 758/2015

RAJESH KUMAR

..... Petitioner

Through: Mr. Sunil Kadian, Advocate.

versus

SUNIL KUMAR

..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

O R D E R

% **08.08.2016**

Crl.M.A. No.17658/2015

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

CRL.L.P. 758/2015 and Crl.M.A. No.17657/2015

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

4. The petitioner has preferred the present leave petition to assail the order dated 04.03.2015 passed by the learned MM, Rohini Courts, Delhi in

CC No.124/1/11, whereby the petitioner's complaint under Section 138 of the NI Act preferred against the respondent No.2 has been dismissed and the respondent acquitted.

5. The case of the petitioner was that the petitioner had advanced a friendly loan of Rs.3.4 Lakhs to the respondent accused and a post-dated cheque for the said amount had been issued by the respondent. When the said cheque was presented for payment, it was dishonoured. After issuance of notice, since the amount was not paid, the complaint has been preferred.

6. The respondent upon being summoned took the defence that he had taken a loan of Rs.20,000/- and not Rs.3.4 Lakhs. The case of the complainant was that he had borrowed a sum of Rs.2.4 Lakhs from his brother-in-law at the time of advancement of the loan of Rs.3.4 Lakhs to the accused. During his cross-examination, the petitioner admitted that there was no written acknowledgement of the said loan allegedly advanced to the accused. The petitioner also did not lead any evidence to establish that Rs.2.4 Lakhs were given by his brother-in-law to him for being loaned to the accused. During the cross-examination of the complainant, he stated that the said advance has been made in the presence of his friend Vicky, however, Vicky was not produced as witness by the complainant and this fact was not even stated in the complaint.

7. The learned Magistrate also observed that the cheque in question was filled in different handwritings. The amount in words was written in Hindi language, whereas the name of the complainant was written in English language. The ink used in the signatures upon the said cheque is different

from the ink used in filling the rest of the contents of the cheque. Though the petitioner was an income-tax assessee, the petitioner had not reflected the availability of funds for advancing of loan and the loan itself in the income-tax returns. In this background, the Court held that the presumption under Section 118 and 139 of the NI Act stood rebutted and the petitioner had not been able to establish the existence of a recoverable debt from the respondent.

8. The submission of learned counsel for the petitioner is that the fact that the respondent had issued the cheque evidences the liability of the respondent. He also states that merely because the advancing of loan had not been reflected in the account/ income-tax returns, the same cannot be considered as fatal to the petitioner's complaint. In this regard, he places reliance on ***Lekh Raj Sharma Vs. Yash Pal Gupta***, Crl.L.P.567/2014 decided by this Court on 30.06.2015.

9. The mere existence of the cheque which is signed by the accused does not conclusively prove the existence of recoverable debt. It only raises a presumption in law with regard to the existence of the debt. The said presumption is a weak presumption, which can be rebutted by the accused either by leading his own evidence, or even without leading evidence and merely relying upon the case of the complainant and his cross-examination and his witnesses. The yardstick applicable in respect of the defence propounded by the accused is premised on preponderance of probabilities.

10. The decision relied upon by the counsel in ***Lekh Raj Sharma*** (supra) is of no avail. This was a case where advancing of loan was evidenced by

the promissory notes executed by the accused. It was in this background that the failure to show the disbursement of loan in the income-tax returns by the complainant was held not to be fatal.

11. Considering the aforesaid aspect, it certainly cannot be said that the accused had not rebutted the presumption under Section 139 of the NI Act. There is no infirmity in the impugned order.

12. Dismissed.

VIPIN SANGHI, J

AUGUST 08, 2016

B.S. Rohella