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

\+ CRL.L.P. 193/2015

ATUL AGGARWAL ..... Petitioner

Through: Mr. M.K. Perwez, Adv.

versus

VINOD KUMAR SHARMA ..... Respondent

Through: Mr. Manish Malhotra, Adv.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

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

% 09.11.2017

1. This Criminal Leave Petition has been preferred by the appellant under section 378(1) of the Code of Criminal procedure, 1973 (Cr.P.C) against the impugned order/judgment dated 14.10.2014 passed by the Ld. MM, Rohini Court, Delhi in connection with the complaint under section 138 of the Negotiable Instruments Act vide CC No. : 781/1/05.

2. The complainant's case is that he had given a friendly loan of Rs. 5,00,000/- in cash to the accused on 07.12.2003, who in turn, promised to return the same in the last week of January, 2005. Upon the insistence of the respondent to pay the amount through cheques, the complainant took from the former, three cheques: bearing no. 930506 dated 28.01.2005 for sum of Rs. 2,00,000/-, cheque bearing no. 930504 dated 31.01.2005 for sum of Rs. 1,50,000/- & cheque bearing no. 930505 dated 31.01.2005 for sum of Rs. 1,50,000/-, all drawn on Canara Bank, D.D. Rohini Extension, Delhi towards the repayment of the loan. However, on presentation of the three

cheques in question, the same were dishonoured on 01.02.2005 with the reason "Funds Insufficient". On 25.02.2005, a legal demand notice regarding the cheques in question was issued to the respondent through Registered AD and UPC; the respondent did not reply to the same. On 14.10.2014 the Ld. MM, Rohini Court, New Delhi acquitted the respondent and hence, the appellant has preferred an appeal before this court.

3. In acquitting the respondent vide judgment/order dated 14.10.2014, the Ld. Trial Court observed as under:-

> *"16. I have perused the entire record and have given due considerations to the submissions made by the respective counsels of the parties. In the present case, defence taken by the accused is that he has not taken any friendly loan of Rs. 5,00,000/- from the complainant and the complainant used to take cheques from him to show his solvency to the wholesale sellers of medical stores for purchasing medicines on credit from them with representation to them that after getting the cheques encashed, he would make payment to the said wholesalers. Complainant during cross-examination accepted that he has a medicine shop in the name of Jagdamba Medicos. Any document regarding the loan transaction is not placed on record by the complainant. Any witness to the loan transaction is also not examined by the complainant. As per the complainant, loan for sum of Rs. 5,000/- was given by him at the rate of 2-2.25% per month and the accused paid the interest for several months by way of cheques. This fact is not proved by the complainant by way of any documentary evidence. Source of giving loan has also not disclosed by the complainant. He stated in his cross that he has no income and he does not pay income tax.*

Complainant has not placed on record even his pass book to prove the transactions by way of cheques between him and the accused. Further, complainant stated that he did not present some cheques given by the accused towards the interest were not presented by him with the bank and no reason for non presentation of the cheques is given by the complainant. This submission of the complainant raises doubt over the factum of advancement of loan to the accused, as no prudent man would keep the cheques with himself instead of presenting the same with the bank. Complainant has given contradictory statements in his cross-examination regarding any other transaction between him and the accused. He accepted that some cheques were given by the accused which were pertaining to different transaction. However, earlier he stated that there was no other transaction between him and the accused. This further raises doubt over the complainant's version. Complainant during cross-examination was not sure regarding the date fixed for return of loan. One another contradiction in the cross of complainant comes regarding giving of cheque of Rs. 5,00,000/-. As per complainant he presented the same cheque with the bank and he did not take any action for the same. Complainant gave contradictory statement regarding returning of the same cheque to the accused. He also stated that the cheque is lying with him. He could not tell the date, month or year of the cheque. Complainant also could not tell the due amount of interest upon the accused as on 25.01.2005. Further, two cheques in question out of three cheques are of same date. This also raises doubt over complainant's case as why accused would give two cheques of same date.”

4. Section 138 of the Negotiable Instruments Act, 1881 ("NI Act") has three main ingredients:-

> *i) That there is legally enforceable debt;*
> *ii) That the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt and*
> *iii) That the cheque so issued had been returned due to insufficiency of funds.*

In ***Hiten P. Dalal v. Bratindranath Banerjee*** (2001) 6 SCC 16, the Supreme Court held that presumptions under both, sections 118(a) and 139 are rebuttable in nature. The relevant portion is as under:-

> *"22. Because both Sections 138 and 139 require that the court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v. A. Vaidyanatha Iyer [MANU/SC/0108/1957 : AIR 1958 SC 61 : 1958 Cri LJ 232] 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. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." (Ibid. at p. 65, para 14.) Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged*

> *with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact"*

5. It is clear that no documents regarding loan transactions have been placed on record by the complainant; he has also failed to provide any documentary evidence for the loan of Rs. 5,00,000/- which was purported to have been extended to the respondent at an interest of 2-2.25% per month. Keeping in mind the essential ingredients of section 138 of the NI Act and the aforesaid decision of the Supreme Court, the complainant has not been able to prove the existence of a legally enforceable debt apropos the purported loan amount. Whereas, as seen from records, the respondent referring to the nature of his business transactions with the complainant, has successfully been able to rebut the presumption in favour of the complainant under sections 138 and 139 of the NI Act.

6. In the aforesaid circumstance, this court finds no reason to interfere with the impugned judgment/order of the Ld. Trial Court dated 14.10.2014 acquitting the respondent under section 138 of the Act.

7. Hence, the petition is dismissed.

NAJMI WAZIRI, J

NOVEMBER 09, 2017/gr