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

\+ CRL.L.P. 497/2018, CRL.M.A. 29125/2018,CRL.M.A. 29126/2018

PARVEZ ASGHAR ..... Petitioner

Through: Mohd. Arif, Adv.

versus

LAL MOHD. ..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

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

% **02.08.2018**

The petitioner impugns an order dated 24.04.2018 which dismissed his complaint under section 138 of the Negotiable Instruments Act, 1881 ('the Act') on the ground that the petitioner has been unable to explain the source of Rs.1 lac which was allegedly loaned to the respondent and that he had given two versions of the witnesses before whom the said monies were loaned. In the first scenario, it was claimed that the money was given to the respondent as a loan in the presence of his friends namely Mohd. Arif, Kasim, Firoz Malik and two other persons, whereas in another version the petitioner stated that the money was given in the presence of his daughter and wife and at his residence.

The impugned order records that the petitioner is working as an AC mechanic and he has been unable to show the source of funds for lending it to the respondent. The petitioner claimed that his brother had loaned him the amount of Rs. 1 lac for repairs of his own house. This brother was never produced as a witness in support of the said contention, therefore, the veracity of his claim of having the financial wherewithal to advance loan, itself was doubtful.

It was the case of the respondent that he has subscribed to a "committee" and paid his contribution 2 or 3 times and thereafter he stopped making the contributions. The blank cheque was given to the petitioner as a security of being a member of the committee. The petitioner himself had admitted that he had filled in the details in the cheque. In other words, the cheque was not issued against any liability.

The Trial Court has referred to jurisprudence on the subject i.e. the defence set up under section 139 of the Act. The test of defence set up under section 139 of the Act is as to whether the defence is probable and the fact is not that the accused must prove it beyond reasonable doubt, as is required in criminal proceedings. It had referred to the following judgments:

(i) Hiten P. Dalal vs. Bratindranath Bannerjee (2001) 6 SCC 16;

(ii) Krishna Janardan Bhatt v. B.G. Hedge, AIR 2008 SC 1325.

The impugned order has reasoned as under:

> *"17. 1 have perused the testimony of the complainant/CWl. During cross-examination, he stated that he was working as A.C. Mechanic aid whatever savings he used to deposit in his bank. He admitted that he has not withdrawn the loan amount from any bank and had arranged the same from his elder brother. It is pertinent to note here that neither this fact was mentioned in the complaint nor complainant has examined his brother as a witness to corroborate his version. Failure to examine his brother is a serious flaw to the complaint case as the entire loan amount was arranged by the complainant from his brother. It implies that the*

complainant was not having financial capacity of his own to give a loan of Rs.l lac to the accused. Thus, the examination of his brother was necessary in the facts and circumstances of this case to elicit, whether he had means to give financial assistance of Rs.l lac to complainant/his brother.

18. Moreover, the testimony of the complainant also do not inspire confidence for the reason that he has failed to explain the purpose for which the accused has borrowed the loan. Complainant is admittedly working as a Mechanic. He stated that he took financial assistance from his brother for repairing his house and deferred the repair work on the asking of the accused. Though complainant avers that accused is his friend however, at the same time he was unable to tell the basic details of the accused i.e. about the family of the accused or the financial position of the accused i.e. his bank details, his turn over etc. Moreover, the complainant was even unable to tell the exact requirement for which the accused has borrowed the amount from him and even then he advanced a sum of Rs.l lac to the accused. Pertinent to note here is that complainant himself stated that this amount was given to him by his brother for repairing the house. Thus, the version of the complainant appears to be highly improbable. On one hand he is saying that the amount was given to him by his brother for repairing the house however, instead of repairing the house he gave the same to the accused as a loan and that too without knowing the exigencies/requirement of the accused. This fact is difficult to digest and raises a serious doubt as to the testimony of complainant.

20. In these circumstances, I have no hesitation in holding that from the facts and circumstances, accused has been able to probabalize his defence *that the cheque was given as a security and were later on misused by the complainant. The whole case of the complainant regarding advancement of loan appears to be doubtful as he has failed to show the source of funds. The accused was required to discharge this burden only by preponderance of probability which through the cross-examination of complainant he has been able to do. Mere fact that accused did not enter the witness box does not make any difference. Thus, accused has been able to disprove the presumption of issuance of cheque in question against a legally recoverable debt or liability."*

The financial capacity to extend the loan was never proven, nor was the factum of the loan; two versions of the alleged loan transaction were set, each defeating the other; the cheque was filled up by the complainant; it being given as a security for the accused being in a 'committee' remains unchallenged; the liability of dues repayable is not established; the probable defence was set up by the accused.

In view of the above, the Court finds no reason to interfere with the said order. The petition is without merit and it is accordingly dismissed.

NAJMI WAZIRI, J

AUGUST 02, 2018/acm