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

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Judgment delivered on: 28.02.2018

+ **CRL.M.C.5326 /2013**

DEEPAK KUMAR

..... Petitioner

versus

THE STATE & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner :

Mr M.T.Malik

For the Respondents :

Ms Anita Abraham, APP.

Mr. A.K. Singh, Adv. for R-2

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

28.02.2018

SANJEEV SACHDEVA, J. (ORAL)

Crl.M.A.2309/2018(early hearing)

1. By this application, the petitioner seeks advancing of the next date of hearing. The matter is fixed for 14.05.2018. For the reasons stated in the application, the application is allowed.
2. With the consent of the parties, the petition is taken up for hearing today.
3. The next date of 14.05.2018 stands cancelled.

CRL.M.C. 5326/2013

1. Petitioner is aggrieved by order dated 22.11.2013, whereby the Trial Court has declined to summon the accused in the complaint filed under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as '*the Act*').
2. It is contended in the complaint that the complainant, i.e. the petitioner and respondent No.2 are brother and sister. The complainant had filed the subject complaint contending that petitioner had provided financial help to the respondent No.2 for payment of instalments for the plot bearing No.B-57, Sector-65, Noida, U.P. as well as for payment of lease rent and other charges towards fire work, completion work, extension charges along with penalty etc.
3. It is alleged in the complaint that since respondent No.2 did not have sufficient funds for the same, the complainant provided financial assistance in the sum of Rs.81 lakhs. Some payment was made through bank account and some was made in cash.
4. It is alleged that respondent No.2 issued the subject cheque for Rs.81 lakhs towards discharge of the said liability. When the cheque was presented, the same was dishonoured with the remark '*no such amount*'. Inquiries by the petitioner revealed that the respondent No.2 had opened the aforesaid account but later on, the same was closed. Legal Notice was issued, which was replied to, however, liability was

denied. The petitioner thereafter filed the subject complaint.

5. By the impugned order, the Trial Court held that documents on record do not show that the said amount of Rs.81 lakhs was given as loan on any date. The Trial Court found that petitioner had been unable to show as to how the figures of Rs.81 lakhs had been given to accused. The Trial Court noticed that the complaint is silent as to when and where the cheque was handed over by the accused to the complainant. The Trial Court was of the view that no legally enforceable debt or liability, even *prima facie*, was there and accordingly, the Trial Court was of the view that despite the presumption under Section 139 of the Act, no *prima facie* case was made out under Section 138 of the Act.

6. Learned counsel for the petitioner contends that petitioner had led evidence and specifically deposed that the sum of Rs.81 lakhs was incurred by the petitioner towards the charges and other expenditure, which were paid to the Noida Authorities on behalf of respondent No.2. The petitioner, in his affidavit before the Trial Court had placed on record bills/cash memos, bank drafts/pay orders and copies of payment, challan made to Noida Authorities and purchase of building material etc. in the sum of Rs.27 lakhs to establish that he had incurred expenditure for the plot allotted to respondent No.2 and the construction raised thereon, and cheque was issued in discharge of the said liability.

7. Learned counsel appearing for the respondent No. 2 contends that there is no legally enforceable debt and that the petitioner has failed to show that any payment of Rs.81 lakhs was made either to or on her behalf. It is contended that though there may be a presumption under Section 139 of the Act, the presumption is rebuttable and since the petitioner had failed to show that petitioner had advanced/spent Rs.81 lakhs, there is no infirmity in the order of the Trial Court.

8. I am unable to accept the contention of the learned counsel for the respondent, for the reasons, Section 139 of the Act raises a presumption in law that the holder of a cheque has received the cheque for discharge in whole or in part of a debt or liability.

9. Though the presumption under Section 139 of the Act is rebuttable, however, reading of Section 139 shows that under law, it is to be so presumed unless the contrary is proved. The fact that the Section uses the term “*unless the contrary is proved*”, shows that the burden would be on a person, who seeks to rebut the presumption, to prove to the contrary. It would not be open to the Court to presume against the legal presumption.

10. The fact that the petitioner, in the present case, has placed on record certain bills etc. as well as the cheque, which is alleged to have been signed by respondent No.2, it would be sufficient to raise a presumption in favour of the petitioner. After the presumption arises in favour of the petitioner, it would be for the respondent to prove to

the contrary. The onus would be on respondent No.2 to prove to the contrary.

11. Clearly, the Trial Court has fallen in error in presuming against the legal presumption. In view of the same, the impugned order is not sustainable.

12. Accordingly, the order dated 22.11.2013 is set aside. The complaint case is restored. List the matter for directions before the concerned Trial Court on 19.03.2018 for passing appropriate formal orders for summoning the accused/respondent No.2.

13. It is clarified that this Court has not examined the merits of the contentions of either party, and any observation made herein shall not be treated as conclusive or binding on the Trial Court qua the merits of the matter.

14. The Petition is disposed of in the above terms.

15. Order Dasti under signatures of the Court Master.

SANJEEV SACHDEVA, J

February 28, 2018

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