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

\+ **<u>CRL.L.P. 528/2018 & Crl. M.A. No.29844/2018</u>**

CHANDRA SEKHAR ..... Petitioner

Through: Mr. IB. S. Thokchom, Advocate.

Versus

ASHOK KUMAR ..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

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

% **13.08.2018**

This petition seeks setting aside of the impugned judgment/order dated 05.07.2018 passed by the learned Metropolitan Magistrate (N.I. Act), Patiala House Courts, New Delhi in C.C. No. 22351/16 (Old No. 3629/1/15) under section 138 of the Negotiable Instruments Act, 1881 (NI Act).

Despite the query being repeated, the learned counsel for the petitioner fails to show any document whereby a liability has been accepted by the respondent or a loan to the latter has been recorded. He submits that there is no such document and that the transaction was only for a period of three months. Evidently, the petitioner has no evidence to show that the monies were given to the respondent as a loan so as to bring it under the purview of section 138 NI Act.

Relying upon the Judgment of the Supreme Court in ***John K. Abraham vs. Simon C. Abraham & Anr (2014) , 2 SCC 236,*** the Trial Court recorded as under:-

"39. Document EX DW 1/A very categorically records that the accuped in lieu of loan of ,Rs. 1,00,000/- advanced by DW-4 Ghasi Ram has issued to him a cheque drawn of Vijaya Bank as a security cheque. It has also been duly proved that towards the repayment of this loan the accused has paid a sum of Rs,50,000/- through his son at the house of Ghasi Ram. Hence, the cheque issued could not have been used at all for realisation of the entire loan amount.

40. It has already been noted that owing to the failure of the complainant to show the source from where he advanced the loan to accused, as alleged by him, no presumption under Section 118 or, 139 of the NI Act can be raised, in his favor. Moreover, the complainant, in his cross-examination, stated that he mentioned in his Income Tax Returns about the loan advanced to the accused. However, to prove this fact he did not produce his Income Tax Returns for the relevant period.

41. Accordingly, although no date of advancement of loan was mentioned by the complainant in his complaint and also no source of funds for advancement of loan was mentioned, but still the complainant had one opportunity to produce his Income Tax Returns and show that he had mentioned the fact of advancement of loan therein. However, complainant even failed to lead evidence in the form of his Income Tax Returns.

42. In the most humble opinion of this court, the complainant has failed to make a case showing advancement of cash loan for a sum of Rs.1,20,000/- by him to the accused.. But, on the contrary the accused has been able to show preponderance of probability in the defence raised by him.

43. Before parting it is expedient to discuss a few arguments made by the complainant. Complainant argued that the accused has committed forgery as he has admitted during his cross-examination that before filing document EX DW 1/A on record he made his son Pankaj sign it. He argues that the document in original EX DW 1/A does not contain sign of Pankaj; but the copy of the same filed along with application under Section 145 (2) NI Act and also placed on *record by the complainant i.e. Mark A does contain his signatures.*

44. It impertinent to note that no question direct or implied, or any suggestion positive or negative was given by the complainant to accused, when he was cross-examined as DW-1 or to his son when he was cross-examined as DW-2 that why and under what circumstances the signatures were put on the document.

45. Moreover, it is the photocopy of the document bears the signatures of son of the accused. However, g:, document itself i.e. EX DW 1/A does not contain any interpolation as such. Moreover, there is no addition, or interpolation with respect to the contents of the document. Except for signatures of Pankaj (son of the accused) there is no difference between EX DW 1/A and Mark A. Accordingly, in the opinion of the court, even if the copy of a document contains an additional signature, under whatsoever circumstances it might have been put, the contents of the original document which does not contain any such signatures cannot be ignored.

46. The complainant has also highlighted contradictions in the defence and testimony of accused. For instance, it is argued that the accused at different stages of trial has given varied description of gold ornaments allegedly pledged with Ghasi Ram at the time of taking of loan from him. That at one juncture accused alleged that document EX DW 1/A is in possession of Ghasi Ram but later himself produces it . That at one juncture accused states that EX DW 1/A was signed by three witnesses, i.e. his son, his sister and his nephew, but later on he alleges that it was not signed by any one.

47. As far as these contradictions are concerned, this court is of the opinion that they are not material contradictions. During the course of trial a person is likely to complicate. Hence, his testimony, given on oath has to be given the credence over other statements, such as one made under Section 313 Cr.P.C. which is made without oath. Moreover, the contradictions be evaluated in the overall facts and circumstances of the case and statements ought hot be appreciated in isolation.

48. Accordingly, based on the above done discussion, especially on the uncontroverted testimony of DW-4 and the testimony of DW-2 and DW-3 which corroborates with the defence raised by the accused and in view of the fact that EX DW 1/A and EX DW 1/B bears the signatures of Ghasi Ram and were executed by him and in the absence of proof of source from where the complainant advance loan, to the accused, this court is of the opinion that the accused has been able to show existence of preponderance of probability in his defence raised and the dishonored cheque was not issued to the complainant in discharge of any legally enforceable debt or other liability. Hence, the accused Ashok Kumar is hereby Acquitted for dishonor of EX CW 1/A for a sum of Rs. 1,20,000/-."

The import of the preceding reasoning is that the complainant has not shown that the cheque was issued in discharge of a debt or liability. Therefore, the complaint would not come under section 138 of the NI Act. The respondent has discharged his rebuttable presumption.

In view of the above, the Court finds no reason to interfere with the impugned order. It, alongwith pending application, is dismissed accordingly.

NAJMI WAZIRI, J.

AUGUST 13, 2018

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