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

\+ CRL.L.P. 808/2018, CRL.M.A. 49016/2018

MR. MAHESH KUMAR PUNJABI ..... Petitioner

Through: Ms. Angna Dewan, Advocate.

versus

STATE & ANR. ..... Respondents

Through: Mr. Tarang Srivastava, APP for State.

**CORAM:**
**HON'BLE MR. JUSTICE NAJMI WAZIRI**

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

% **06.12.2018**

This petition seeks leave to appeal against the order dated 11.05.2018, dismissing the petitioner's complaint case under section 138 of Negotiable Instruments Act, 1881 ('NI Act'). It is the petitioner's case that the cheque for Rs. 43,500/- was in payment as commission for having furnished a loan of Rs. 58 lacs in favour of the respondent. However, the claim was denied by the respondent that the cheque in question was not signed by him. It is cheque for Rs. 43,500/- which was signed by him. Accordingly, he raised a probable rebuttable defense or presumption under section 139 of NI Act. The petitioner ought to have on its own merit. He was not able to prove the details of the loan transaction i.e. who was the lender or the borrower and when the said transaction was done. She refers to the judgment in ***V.S. Yadav vs. Reena*** 172 (2010) DLT 561, which reads as under:-

> *"6. It must be borne in mind that the statement of accused under Section 281 Cr. P.C. or under Section 313 Cr.*

*P.C. is not the evidence of the accused and it cannot be read as part of evidence. The accused has an option to examine himself as a witness. Where the accused does not examine himself as a witness, his statement under Section 281 Cr. P.C. or 313 Cr. P.C. cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused was truthful. In the present case, the accused in his statement stated that he had given cheques as security. If the accused wanted to prove this, he was supposed to appear in the witness box and testify and get himself subjected to cross examination. His explanation that he had the cheques as security for taking loan from the complainant but no loan was given should not have been considered by the Trial Court as his evidence and this was liable to be rejected since the accused did not appear in the witness box to dispel the presumption that the cheques were issued as security. Mere suggestion to the witness that cheques were issued as security or mere explanation given in the statement of accused under Section 281 Cr. P.C., that the cheques were issued as security, does not amount to proof. Moreover, the Trial Court seemed to be obsessed with idea of proof beyond reasonable doubt forgetting that offence under Section 138 of N.I. Act was a technical offence and the complainant is only supposed to prove that the cheques issued by the respondent were dishonoured, his statement that cheques were issued against liability or debt is sufficient proof of the debt or liability and the onus shifts to the respondent/ accused to show the circumstances under which the cheques came to be issued and this could be proved by the respondent only by way of evidence and not by leading no evidence."*

The Trial Court has reasoned as under:-

*"7. I have heard the submissions made on behalf of the parties and have also perused the record. Before appreciation of evidence led on behalf of the parties, at the very outset, I would like to narrate the legal principles, relevant for adjudication of complaint under Section 138 of NI Act, laid*

*down in several judgments of Hon'ble Supreme Court of India and of various High Court including our own High Court. In my considered opinion, it is now well settled that in case the accused admits his signatures on the cheque in question, there arises a presumption in terms of Sections 118(a) and 139 of the NI Act to the effect that the same was issued by him for valid consideration and in discharge of legally enforceable debt or liability towards the complainant. Though a Division Bench of Hon'ble Supreme Court of India in Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54 has observed that the presumption under Section 139 of the NI Act does not go to the extent of presuming the existence of a legally recoverable debt, however in a later judgment titled as Rangappa v. Sri Mohan, 2010 11 SCC 441 a larger Bench of Hon'ble Supreme Court has expressed its disagreement with the aforesaid view holding that there is also an initial presumption regarding the existence of legally recoverable liability under Section 139 of the NI Act. Further, it has been held that the presumptions under Sections 118(a) and 139 of the NI Act are rebuttable in nature and for rebuttal of the same accused need not even step into the witness box as the accused can rebut the same by placing reliance on the material brought on record by the complainant. It is also well settled legal position that the presumptions can be rebutted even by raising presumptions of fact and law on the basis of material available on record. The aforesaid propositions of law have been laid down by Hon'ble Supreme Court in M/s Bharat Barrel & Drum Mfg. Co. v. Amin Chand Pyarelal (1999) 3 SCC 35, Krishna Janardhan Bhat's case (Supra) and Rangappa v. Sri Mohan's case (Supra). It is further well settled in the aforesaid judgments that the standard required from the accused to prove his defence is preponderance of probabilities and accused need not prove his defence beyond reasonable doubts.*

*8. Now let us examine the facts of case in hand in the light of aforesaid legal principles. In the present case, accused has not denied his signatures on the cheque in question, his only plea is that he had signed the cheque of Rs. 43,500/- for* *handing over the same to a third party, however, the same was probably stolen by the complainant from his office as he used to visit his office. Thus, in view of admission by the accused of his signatures on the cheque in question, there arises a rebuttable presumption in favour of complainant in terms of Section 118 and 139 of the NI Act not only regarding the existence of legally enforceable ability of accused towards the complainant but also regarding issuance of cheque in question by accused in favour of complainant. For rebuttal of the said presumptions, it was not incumbent upon the accused to step into the witness box and he could have rebutted the same by way of cross-examination of complainant. Besides, the onus upon the accused was not to prove, his defence beyond reasonable doubts but on the touchstone of preponderance of probabilities.*

*9. In the case in hand, the sole case of complainant as per complaint is that the cheque in question was issued by accused in partial discharge of his liability towards the complainant on account of commission against the loan of Rs. 58,00,000/- facilitated by the complainant for the accused. During his cross-examination, complainant has failed to disclose the details of the loan allegedly facilitated by him for the accused and details of agreement between the parties for commission on the same despite specific questions asked by counsel for accused. Non-disclosure of the said details by the complainant in his complaint, evidence by way of affidavit and even during his cross-examination despite specific questions of counsel for accused renders the case set up by the complainant in the complaint as reasonably improbable and rendering the defence sought to be taken by the accused regarding cheque with the amount and signatures of accused having been stolen from his office reasonably probable particularly in view of the fact that a bare perusal of cheque shows that name of payee and date in the cheque in question has been filled in different ink and handwriting than the amount in words and figures and signatures.*

*10. No doubt, accused had failed to lodge any police complaint regarding alleged stealing of cheque and has failed* *to respond the legal notice of complainant despite receipt of the same, however, the aforesaid facts by itself would not be sufficient to hold the accused guilty for the offence under Section 138 of NI Act in view of observations made by this Court in previous paragraph".*

In view of the preceding discussion and for the reasons mentioned above, the Court finds no merits to differ with the impugned order. Accordingly, the petition is dismissed.

**NAJMI WAZIRI, J**

**DECEMBER 06, 2018**
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