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

+ **CRL.L.P. 762/2015**

VINOD KUMAR

..... Petitioner

Through: Mr. Sunil Kumar, Advocate.

versus

PAWAN KUMAR GOYAL

..... Respondent

Through: Mr. Vikas Sharma, Ms. Charu Gupta
and Ms. Ritika Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

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09.07.2018

The petitioner seeks leave to impugn an order dated 24.09.2015 dismissing his complaint for prosecution of the respondent under section 138 of the Negotiable Instruments Act, 1881 ('NI Act'). The learned counsel for the petitioner submits that the impugned order has erred both in facts and law. It is the petitioner's case that towards purchase of a property he had given an advance of Rs.12 lacs to the respondent accused in cash. The deal fell through. The respondent had returned Rs. 4 lacs and a cheque of Rs. 8 lacs was issued by him in repayment of the balance amount, which upon presentation was dishonoured. Hence, the aforesaid complaint was filed. The impugned order has rejected the complaint, holding *inter alia*:-

"7. The case of the complainant is that amount of Rs. 12 Lacs was paid to the accused in cash which has been denied by the accused. Admittedly, there is no document in

support of the alleged transaction, in his complaint, the complainant stated, that the agreement in question was verbal. However, during his cross-examination, he changed his stand to depose that an agreement-cum-receipt was executed qua the payments made to the accused. However, same were torn by the accused. Ex. CW1/D1 which is testimony of the complainant in a separate civil suit between the parties, was put to the complainant in his cross-examination wherein he had deposed that there was no written agreement qua the transaction in question. Also, there are no witnesses to the transaction in question. In his cross-examination, the complainant stated that payments were made to the accused in the presence of Mr. Sanjay Kumar and Mr. Khem Chand. However, none of the two persons were examined or cited as a witness in this case.

8. When questioned as to the source of funds advanced to the accused, the complainant stated that he had borrowed Rs. 6 Lacs from his mother, Rs. 4 Lacs from his brother and the remaining Rs. 2.5 Lacs were arranged by himself. The complainant stated that the amount was given by mother and brother in the year 2008 out of sale proceeds of a property. However, the same remained unsubstantiated since only photocopies of property documents were placed on record i.e. Mark B and Mark C but, the same cannot be read in evidence being mere photocopies.

9. Admittedly, the complainant did not disclose the amount of Rs. 12 Lacs paid to the accused in his income tax return. This in itself raised serious doubts as to the veracity of the complainant's claim.

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12. in the instant case as well, a huge amount of Rs. 12 Lacs is claimed to have been paid in cash. No receipt was obtained by the complainant. He was also not able to show any documentary evidence in support of payment of such a huge amount to the accused. The amount is also not reflected in his income tax returns. The complainant sought to suggest that he had obtained the funds from his relatives in order to

make the payment. Admittedly, none of his relative entered into the witness box. There is no cogent evidence produced by the complainant to prove the foundational facts and as such, the question of shifting the burden of proof on to the accused would not arise. It appears from the cross-examination of the complainant itself that the accused was able to rebut the statutory presumptions U/s. 118 and 139 of the N.I. Act.

13. So far as the legal notice is concerned, the accused denied having received the same. However, the accused did not lead any evidence in support of his contention. The accused also did not deny that address mentioned on legal notice is his correct address. As per the provisions of Section 27 of the General Clauses Act, a notice sent through registered post at the correct address shall be presumed to have been duly served upon the addressee. In view of same, it is presumed that the legal notice in the instant case was duly served upon the accused.

14. In the light of the foregoing discussion and findings, the accused was successfully able to rebut the presumption by raising a probable defence. Per contra, the complainant failed to establish that there existed a legally enforceable liability against the accused, in discharge whereof the impugned cheque was issued. As the essential condition of Section 138 are not satisfied, the offence U/s. 138 N.I Act is not made out against the accused”.

What emanates from the above is that the petitioner – complainant had not brought on record anything to show that he had paid the said monies to the respondent. The latter has already denied receipt of any such monies or any such understanding between them. There is no record of the transaction or a written agreement qua the proposed sale or purchase of the property; the persons from whom the petitioner is claimed to have borrowed Rs.6 lacs and Rs. 4 lacs i.e. his mother and brother respectively, were not examined by the petitioner in support of his case; the impugned order

doubted his capacity to have paid the huge amount of Rs.12 lacs in cash; there was no receipt issued by the complainant; nor was such amount reflected in any Income Tax Return of the petitioner. In the absence of any cogent evidence, the impugned order held that the petitioner has not been able to make out a case for any outstanding debt or liability, which was repayable by the respondent. On the contrary, the respondent had denied all the claims of the petitioner and stated that it was a case of misuse of the cheque and that no liability was made out against him.

The learned counsel for the respondent submits that the petitioner's suit on the same cause of action has been dismissed. The Court would note that the rebuttable presumption under section 139 NI Act has been duly discharged by the respondent and that the cheques were issued in discharging of liability or debt. Since, this issue has not been established by the petitioner, the respondent cannot be liable to be prosecuted.

In view of the above, the Court finds no reason for allowing the leave petition. Accordingly, the petition is dismissed.

NAJMI WAZIRI, J

JULY 09, 2018/RW