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

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Decided on: 27.02.2019

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CRL.L.P. 164/2019 & Crl. M.A. Nos.4473-75/2019

RAKESH JAIN

..... Petitioner

Through: Mr. Charan Singh and Mr. S.C.Sharma,
Advocates.

Versus

STATE & ANR.

..... Respondent

Through: Mr. Tarang Srivastava, Additional Public
Prosecutor for State.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. The petitioner seeks leave to appeal against the order dated 24.07.2018 passed by the learned Metropolitan Magistrate (East), Karkardooma Court, Delhi, dismissing his complaint case under section 138 of the Negotiable Instruments Act, 1881 ('NI Act'). It is the petitioner's case that the impugned order erred in so far as it did not take into account the prior business relationship between the petitioner and respondent no.2 on account of which the petitioner had given a loan of Rs.5,00,000/- to respondent no.2. Moreover, the impugned order also disregarded the statement of respondent no.2, where he admits to have taken a loan from the petitioner thus admitting to the existence of a legal debt or liability.

2. The Court finds the reasoning of the petitioner to be untenable. If the petitioner had forwarded a loan of Rs.5,00,000/- to respondent no.2, there would be some mention of it in his ITR.
3. While examining the aforesaid contentions, the learned Trial Court has reasoned as under:-

“15. Firstly, the complainant in his complaint as well as in evidence by way of affidavit has stated that accused has approached him for the said loan in the month of November 2014. Paradoxically complainant has also stated that he had advance amount of Rs. 5,00,000/- to the accused by cash and cheque, in different instalments, between the period 13.6.2013 to 14.09.2013. Similar submission has been made by the complainant in his legal demand notice sent to the accused, which is Ex. CWI/E. When the complainant, during his cross-examination, was questioned on the said contradiction he; in his clarification stated that accused had approached him for loan in 2013, however, he had advanced loan to the accused in November, 2014. Thus as in evidence from the above, complainant has been erratic in his submissions with respect to the date of the alleged transaction. The Hon 'ble Supreme Court in Vijay v. Laxamn 2013 (V) AD (SQ 243 and in John K. Abraham v. Simon C. Abraham 2014 (1) CCC (SC) 161, observed that the absence of any details of the date on which the loan was advanced, is one such infirmity, which goes to the root of the matter.

16. Further complainant in para no. 3 of his legal demand notice Ex. CWI/E has stated that an agreement dated 13.06.2013 was executed at the time of advertisement of Rs. 5,00,000/- to the accused. However, during his cross-examination when the complainant was asked about the said agreement he stated that he had not informed his counsel about any such written agreement at the time of sending the legal demand notice Ex.CWI/E. When the witness was confronted with para no. 3 of Ex. CWI/E, he stated that the

written document was executed initially a year ago, which was later torn apart with the consent of both the parties. This part of the testimony of the complainant appears incomprehensible to the court. It is highly improbable, that a written agreement would be first executed between parties and therefore would be destroyed, with the consent of the complainant himself, putting to stake an amount of Rs. 5,00,000/-. There is also no witness to the alleged transaction. Moreover, the submission of the complainant that he had not informed his counsel about any such written agreement and the said fact, still being mentioned in Ex. CWI/E, materially affects its credibility. In this eventuality, it is difficult to believe the testimony of the complainant which is marred by numerous inconsistencies.

17. Furthermore, as stated by the complainant, no written agreement was executed between the parties for the said loan transaction, nor any receipt or accounts statement has been filed on record to show the advancement of the loan without to the accused. This despite the fact that complainant in his cross-examination has stated that he has receipt regarding the cash given by him to the accused. However, complainant has failed to give any reason as to why he did not place the said receipt on record during the trial. Complainant in his cross-examination has stated that he has also not shown the loan of Rs. 5,00,000/- in his ITR. The Hon'ble Supreme Court in *Vijay v. Laxman* 2013 (V) AD (SC) 243, any such loan transaction had indeed taken place between the parties is a significant circumstance".

18. Continuing with his paradoxical averments complainant in his complaint and evidence by way of affidavit has stated that accused had issued the cheques in question dated 09.05.2015 to him, 'upon demand'. However, in his cross-examination he has stated that the cheques in question were given in the year 2013. Moreover complainant has himself denied some of the contents of his complaint and evidence by way of affidavit. Therefore, in light of the above evidence, even if the presumptions available under Section 118 and 139 of the

NI Act are pressed into service in favour of the complainant, the accused is able to rebut the said presumptions by raising doubts in the complainant's story.

19. The presumption of law which is to be drawn in favour of the complainant that the cheque has been issued to him for the valid discharge of his debt also gets dislodged by a plausible explanation furnished by the accused. The accused during framing of notice U/s. 251 Cr.P.C. in his statement U/s. 313 Cr.P.C. and during his examination in chief has explained how the complainant came into possession of the cheques in question. It is stated by the accused that the cheques in question were given to the complainant for getting a car loan financed. As per the accused, complainant could not get the car loan sanction and hence, he had requested the complainant to return his cheques. In addition, it is also submitted by the accused in his examination-in-chief that he had sent a legal notice to the complainant demanding back the cheques in question. Accused during his examination-in-chief has also placed on record one letter dated 23.12.2014, copy of which is Ex. DW1/1. Accused by way of this letter has demanded the cheques in question back from the complainant as the complainant was not able to arrange car loan for him. Accused in support of his averment has also examined DW3, who in his examination-in-chief has stated that the cheques in question were given to the complainant for the purpose of vehicle. Nothing has been put forth by the complainant to disbelieve the testimony of DW-1 or DW-3. In these circumstances, the onus shifted upon the complainant to show that the cheques in question were issued to him for the payment of loan amount of Rs. 5,00,000/- and not for the purpose of vehicle finance.

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21. In view of above discussion, it is clear from the evince of the complainant that he has not placed on record any material

to speak of his advancement of Rs. 5,00,000/- as loan to the accused. The accused on the other hand, has been able to probabilize his defence through the cross-examination of DWL as well as the evidence led by him. It is well settled that even though the statutory presumption for offence U/s. 138 NI Act is in favour of the complainant, still, the prosecution is burdened with standing on its own legs. In the instant case, accused has been able to rebut the presumption arising in favour of the complainant U/s. 138 NI Act. Accordingly accused Anand Pal Malik S/o Sh. Amrit Singh R/o H.No. B-188, Shalimar Garden Extension-2, Sahibabad, Ghaziabad, UP, stands acquitted of the offence under Section 138 NI Act. Accused is directed to furnish bail bond and surety bond in terms of section 437A Cr.P.C. for the next six month.”

4. What emanates from the aforesaid discussion is that respondent no. 2 had given two blank cheques with his signature to the petitioner in order to finance a car loan. These cheques are stated to have been misused by the petitioner. Respondent no. 2 wrote to the petitioner asking for the return of the blank cheques, but the same were not returned to him. Respondent no. 2 has admitted to borrowing Rs. 1,50,000/- from the petitioner but he also claims to have returned the amount. This fact is evidenced from the bank statement of respondent no.2. Furthermore, there were significant contradictions in the statements of the petitioner; who had stated that he was in possession of a receipt for the loan given by him to respondent no.2, however, the same was never brought on record; that the petitioner stated that two cheques were given by respondent no. 2 as repayment towards loan of Rs. 5,00,000/- on 09.05.2015 however, in his cross-examination he has stated that the cheques were given to him in 2013.

5. In the circumstances, the petitioner has been unable to prove that the cheques given to him by respondent no.2 were in discharge of a legal debt or liability, whereas the respondent has set up a case in which a rebuttable presumption under section 139 of NI Act is made out.

6. In view of the above, no case is made out for granting leave to appeal to the petitioner. The petition, alongwith with pending applications, stands dismissed.

NAJMI WAZIRI, J.

FEBRUARY 27, 2019

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