

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

Date of Decision: 2nd September, 2014

+ **CRL.A. 1262/2013**

SANTOSH MITTAL Appellant

Through: Mr. Manish Aggarwal,
Advocate

versus

SUDHA DAYAL Respondent

Through: Mr. R.K. Bachchan, Advocate

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

: **SUNITA GUPTA, J.**

1. Challenge in this appeal u/s 378(4) Cr.P.C is to the judgment of acquittal dated 30.01.2013 passed by learned Metropolitan Magistrate in CC No.14114/1 in Complaint case filed u/s 138 read with Section 142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'Act').

2. Before addressing the rival submissions made by the learned counsels for the parties, it would be apt to survey the facts leading up to the present litigation. A complaint under Section 138 of the Act

was filed by the appellant, *inter alia*, on the allegations that accused was an intimate and close friend of the family of the complainant and under the influence of friendship, the accused had requested for a friendly loan of Rs.1 lac somewhere in the beginning of February, 2009. Subsequently, on 13th February, 2009, the complainant had paid Rs.1 lac in cash as loan to the accused as she was in dire need of funds and was facing financial crisis. In lieu of loan, the accused had issued post dated cheque bearing No.150731 dated 14th May, 2009 of Rs.1 lac drawn on SBI in favour of the complainant. The complainant deposited the said cheque after one month from due date, as requested by the accused but the same was dishonoured with the remarks “fund insufficient” vide memo dated 18th June, 2009. On assurance of the accused to present the cheque again, complainant presented the cheque for encashment on 2nd July, 2009 but again the cheque was returned with remarks “insufficient fund” vide memo dated 2nd July, 2009. Same was the fate of the cheque when again presented on the assurance of the accused on 9th November, 2009. Thereafter, complainant sent a legal notice dated 18th November, 2009 calling upon the accused to pay the cheque amount. Despite receipt of legal

notice, the accused did not pay the cheque amount. Therefore, the complainant was constrained to file the complaint.

3. The respondent/accused admitted to having given a cheque to the complainant, however, the defence taken was that a blank cheque was given to the complainant without date and amount as complainant misguided her. She had no liability to pay the cheque amount, as such, payment was not made.

4. The Trial Judge found in favour of the accused by taking note of the defence evidence led by the respondent that the cheque was not given for the alleged loan but it was given as security. There was some business transaction between the complainant and the respondent. A sum of Rs.35,000/- was due which was paid by the accused, as such, there was no liability of Rs.1 lac towards the complainant. By observing that the complainant has failed to prove her case beyond reasonable doubt, the accused was acquitted.

5. Aggrieved, the present appeal has been preferred by the complainant/appellant.

6. Since this is an appeal against acquittal, it will be proper to consider the legal position first. Chapter XXIX (Sections 372-394) of

the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the present Code') deals with appeals. Section 372 expressly declares that no appeal shall lie from any judgment or order of a Criminal Court except as provided by the Code or by any other law for the time being in force. Section 373 provides for filing of appeals in certain cases. Section 374 allows appeals from convictions. Section 375 bars appeals in cases where the accused pleads guilty. Likewise, no appeal is maintainable in petty cases (Section 376). Section 377 permits appeals by the State for enhancement of sentence. Section 378 confers power on the State to present an appeal to the High Court from an order of acquittal. The said section is material and may be quoted *in extenso*;

“378. Appeal in case of acquittal. - (1) Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court, or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the

provisions of Sub-section (3), to the high Court from the order of acquittal.

(3) No appeal under Sub-section (1) or Sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under Sub-section (1) or under Sub-section (2).

Whereas Sections 379-380 cover special cases of appeals, other sections lay down procedure to be followed by appellate courts.

12. Bare reading of Section 378 of the present Code (Appeal in case of acquittal) quoted above, makes it clear that no restrictions have been imposed by the Legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High Court has full power to reappreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such evidence. Both

questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal.

7. After referring to various decisions pronounced by Hon'ble Supreme Court in *Chandrappa and Ors. Vs. State of Karnataka*, 2007 CrI L.J 2136, following general principles were laid down regarding powers of appellate Court while dealing with an appeal against an order of acquittal:-

- (i) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;
- (ii) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;
- (iii) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.
- (iv) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the

presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

- (v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

8. Applying the above principles, let me advert to the factual matrix of the case.

9. Mr. Manish Aggarwal appearing on behalf of the appellant challenged the findings of the learned Trial Court on the ground that issuance of cheque was admitted by the respondent. As such, by virtue of Section 139 of the Act, a reverse burden is cast on the accused to dispel the presumption that the cheque was not issued towards discharge of any legally enforceable debt or liability. The respondent has not been able to rebut the presumption by any plausible material or evidence. The Trial Court failed to consider that a legal notice dated 18th November, 2009, enumerating the fact of friendly loan was duly served upon the accused which fact was admitted by the respondent in reply to notice under Section 251 Cr. P.C. but she failed to rebut the allegations made in the notice by sending any reply. Further in the application under Section 145 (3) Cr.P.C., the respondent nowhere stated that she was in business of

selling clothes or cheque was given as security for said business transaction. The defence taken by the respondent was nothing but an afterthought, inasmuch as, if any such transaction ever existed, it must have been mentioned in the application disclosing her defence. Testimony of DW1 and DW2 are self contradictory. Moreover, presence of DW1 and DW2 at the time of transaction was never put to the complainant in her cross-examination nor any suggestion was given that payment was made by the accused in piecemeal as deposed in their evidence. The accused even went to the extent of forging a false receipt of Rs.15,000/- dated 25th April, 2009 purported to be in signatures of the complainant which was never put to the complainant in her cross-examination. The accused had failed to rebut the presumption and the learned Trial Court erred in not appreciating the evidence in correct perspective, as such, the impugned order is liable to be set aside and the respondent is liable to be punished and penalized in accordance with law. Reliance was placed on ***Rangappa v. Mohan, AIR 2010 SC 1898.***

10. Per contra, it was submitted by Sh. R.K. Bachchan, Advocate for the respondent that the cheque in question was not given for

consideration. It was for security only. It was further submitted that the onus of proving the fact that a sum of Rs.1 lac was given as a loan to the respondent/accused was upon the complainant, however, the complainant has failed to prove this fact, inasmuch as, according to her at the time of giving the loan amount, her husband and nephew were also present but they were not examined. Moreover, the complainant failed to prove the source of income from which the amount was paid. As regards service of legal notice is concerned, it was submitted that in her statement recorded under Section 313 Cr. P.C. the respondent has denied the service of legal notice. Under the circumstances, the complainant cannot get any advantage from the same. It was submitted that the respondent was able to rebut the presumption under Section 139 of the Act. The impugned judgment was passed by the learned Trial Court after due appreciation of the evidence and, therefore, the same does not call for any interference. The appeal is liable to be dismissed. Reliance was placed on ***John K. Abraham v. Simon C. Abraham & Anr.*** 2014 (1) Crimes 66 (SC); ***K. Prakashan v. P.K. Surenderan,*** JT 2007 (11) SC 673; ***M.S.***

Narayana Menon @ Mani v. State of Kerala & Anr., AIR 2006 SC 3366; *Union of India v. Ibrahim Uddin & Anr.*, (2012) 8 SCC 148.

11. Since the contentions relate to the proper interpretation of Section 118 (a), 138 and 139 of the Act, it would be useful to quote the language of relevant provisions:-

“118. Presumptions as to negotiable instruments. - *Until the contrary is proved, the following presumptions shall be made:*

(a) of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

138. Dishonour of cheque for insufficiency, etc., of funds in the account. - *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation - For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability.

139. Presumption in favour of holder.- *It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt, or other liability."*

12. As per record, the complainant examined herself on affidavit in pre-summoning evidence wherein she reiterated the contents of complaint and placed on record the relevant documents. Thereafter the accused was summoned for an offence punishable under Section 138 of the Act. Notice under Section 251 Cr.P.C. was given to her and the questions put to her and the replies are very material which is as under:-

"Q. Did you issue the aforementioned cheque?

A. Yes.

Q. Did you receive the aforementioned legal notice?

A. Yes.

Q. Do you plead guilty or claim trial?

A. *I plead not guilty and claim trial.*

Q. *Do you have any defence?*

A. *I had given a blank cheque to the complainant without date and amount as she misguided me. I have no liability to pay the cheque amount, hence I did not make any payment."*

13. Thereafter, an application under Section 145(2) of the Act was moved by the respondent seeking permission to lead evidence and to cross-examine the complainant, which was allowed. In this application also, substantially the same plea was taken. In addition, it was alleged that the complainant had misused the accused in order to extort the amount from her. Police complaint was also made in this regard.

14. In cross-examination, the complainant reiterated that the amount of Rs.1 lac was given as loan by her to the respondent/accused after taking the same from her husband who was dealing in property business. Following suggestions given to her were denied:-

- (i) that she was doing the business of selling of old clothes;
- (ii) that clothes worth Rs.35000/- were given to the accused for sale and in lieu of this transaction, a blank signed cheque was given by the accused;
- (iii) that the said amount was paid by the accused to her ;

- (iv) when the accused demanded back the cheque, quarrel took place on 18th June, 2009 or that PCR call at 100 number was made, pursuant to which both complainant and the accused were taken to police station;
- (v) any complaint was lodged against her by the accused on 18th June, 2009;
- (vi) and the cheque in question was a security cheque against the loan amount.

15. In her statement recorded under Section 313 Cr.P.C., respondent admitted the issuance of the cheque but reiterated that she had issued a blank signed cheque and the same was given to the complainant towards security as there was some business transaction between her and the complainant and Rs.35,000/- was due from her side. She denied her liability to pay Rs.1 lac to the complainant.

16. In support of her defence, she examined two witnesses. DW1- Amar Dayal is her husband who deposed that a blank cheque was issued by his wife in favour of the complainant as complainant asked his wife to sell some of the clothes and, as such, as a security, blank cheque was given. He went on deposing that his wife purchased clothes for a sum of Rs.35,000/- only. A sum of Rs.20,000/- was paid by the accused when she was with Ms. Sunita Kashyap. Thereafter,

balance amount of Rs.15,000/- was paid in two instalments of Rs.10,000/- and 5000/-. He further went on deposing that he demanded receipt of payments from the complainant whereupon complainant issued him a receipt Mark DA of Rs.15,000/- dated 25th April, 2009. According to him, after some time, complainant and her husband came to his house and demanded more money. They were accompanied by some other person who was recording the whole incident by a camera. The complainant and her husband threatened them and demanded money, thereupon one of the neighbours called PCR, then the matter went to Police Station Prashant Vihar.

17. DW2-Sunita Kashyap has deposed that respondent/accused is her neighbour and was doing the cloth business. A blank cheque duly signed by the accused was given to the complainant as security towards purchase of cloth material. The complainant had assured the respondent that after payment towards cloth material is made, the cheque would be returned. In the year 2009, she went along with the respondent to the house of the complainant to make cash payment of Rs.20,000/-. This cheque was not given for alleged loan but was given as security. At a later stage, the complainant had also given beatings

to Sudha Dayal in her presence at her place, as such, she called the police and a complaint was registered.

18. Learned Trial Court primarily relied upon the statement of these two witnesses for arriving at the conclusion that a doubt was created in the version given by the complainant and the onus shifted upon the complainant to prove her case beyond reasonable doubt which she failed to do as neither receipt for the said loan nor any loan agreement was ever executed towards the loan of Rs.1 lac. Further that she had not examined any other witness to prove the factum of giving loan to the respondent. This finding of the learned Trial Court cannot be sustained due to the discussion made hereinafter.

19. Prior to the filing of the present complaint, a legal notice dated 18th November, 2009 was sent to the respondent by registered AD post, under certificate of posting as well as through courier alleging that a friendly loan of Rs.1 lac was raised by the respondent from the complainant as she was in dire need of funds at that time, in lieu of which a post dated cheque was issued by the respondent which was ultimately dishonoured on presentation due to insufficient funds. As seen above, service of this notice was admitted by the respondent

while replying to the questions put to her u/s 251 Cr.P.C. However, learned counsel for the respondent referred to the statement of the respondent recorded u/s 313 Cr.P.C for submitting that this notice was not received by her. This submission is, however, devoid of merit as the relevant question put to the respondent in this regard was question no.3 which is reproduced as under:-

“Q.3. It is further in evidence against you that the complainant had served legal notice dated 18th November, 2009 upon you within the prescribed period of limitation but you had failed to make the payment despite service of legal notice. What you have to say?

Ans. No.”

20. From this vague answer given by the respondent, it cannot be deciphered whether the respondent was denying the service of the legal notice or failure on her part to make the payment despite receipt of this legal notice. Keeping in view the fact that at the earliest juncture when notice under Section 251 Cr.P.C. was served upon the respondent, she had accepted the service of the legal notice, it does not lie in her mouth to allege that the same was not served upon her. As such service of legal notice prior to filing of the complaint upon the respondent was duly proved.

21. Admittedly, no reply to the legal notice was sent by her thereby rebutting the allegations made by the complainant. As far back in the year 1980, in ***Kaluram v. Sita Ram***, 1980 RCR Note 44, it was held by this Court that when serious allegations are made in a notice and defendant failed to send any reply, then the allegations are deemed to have been admitted. Even in ***Rangappa*** (supra) relied upon by the learned counsel for the appellant it was observed that failure on the part of the accused to reply to the statutory notice under Section 138 of the Act lead to inference that there was merit in complainant's version.

22. As such, failure on the part of the respondent to send any reply to the legal notice reflects that respondent did not controvert the allegations of the complainant that a loan of Rs. One lakh was given by her. Moreover, there is no statutory requirement for execution of loan agreement before giving any amount as loan. Non-examination of the husband or the nephew of the complainant does not lead to any adverse inference. Not only that, during cross examination of complainant, a suggestion was given to her that the cheque in question was a "security towards loan amount", meaning thereby that the

respondent admitted that the amount was given on loan in lieu of which the cheque in question was given by her albeit it was a security cheque. Once the issuance of cheque was admitted by the respondent, the presumption under Section 118 (a) would arise that there is existence of a legally enforceable debt or liability. However, this presumption is a rebuttable presumption. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of

compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own as observed in ***Rangappa*** (supra).

23. According to the respondent, a blank cheque was given to the complainant. It was not disclosed by her as to on what account, blank cheque was given. On the other hand, a perusal of the cheque reflects that the columns were filled not only on the front but there was writing on the backside of the cheque as well. As such, her plea that blank cheque was given to the complainant does not inspire confidence. Moreover, according to her she was misguided by the complainant but it is not disclosed as to how she was misguided by

the complainant nor any such suggestion was given to the complainant. Further, a stand was taken by her at subsequent stage of the proceedings that there was some business transaction between her and the complainant and a sum of Rs.35,000/- was due from her side. If the amount was an ascertained sum, then even otherwise question of giving a blank cheque does not arise. The cheque in question is dated 14.05.2009. As per the testimony of DW-1, the entire payment of Rs.35,000/- was made to the complainant and in fact a receipt was also issued on 25.04.2009 and there was nothing due thereafter. If that was so, where was the occasion of issuing a blank cheque on 14.05.2009. Why did the respondent not demand return of her blank cheque from the complainant. Furthermore, the cheque is dated 14.05.2009 whereas legal notice dated 18.11.2009 was served upon the respondent. Even after service of this legal notice, the respondent did not bother to call upon the complainant to return her blank cheque. In fact, the plea sought to be raised by the respondent that she had given a blank cheque is a sham plea and devoid of any merit. In ***Indian Bank vs. M/s Cheese Wafers (India) Pvt. Ltd & Ors.,*** 76(1998)DLT 893, similar plea was taken that signatures were

obtained on blank documents. It was held that defendant did not raise even a whisper after signing the letter of acknowledgment of liability and, therefore, to contend that the documents signed by the defendant were blank, which was subsequently filled up is only an afterthought to cover their acknowledgment which they had made in 1992. Defendants chose to keep silent about their signatures having been obtained on blank documents. This plea was taken at the time of filing of the application for leave to defend and not earlier at any stage. The conclusion, therefore, is that the plea now sought to be raised by the defendant to the effect that the signatures were obtained on blank documents is sham plea and devoid of any force. Similar view was taken in *Shiv Manohar Vs. Canara Bank*, 1996 ISJ (Banking) 409.

24. Furthermore, by examining two witnesses the respondent tried to set up a case that there was some business transaction on account of which respondent was required to pay a sum of Rs.35,000/- to the complainant. A sum of Rs.20,000/- was paid in the presence of DW-2 Sunita while the balance amount of Rs.15,000/- was paid in two instalments of Rs.10,000/- and Rs.5,000/- by DW-1, husband of the

respondent. It is pertinent to note that when the complainant was cross examined, no such suggestion was given to her that the amount of Rs.35,000/- was paid in three instalments by DW-1 and DW-2.

25. Further DW-1 has tried to prove a receipt of Rs.15,000/- Mark DA for showing that the same was given by the complainant. The receipt was not duly proved and was simply marked, therefore, same cannot be read in evidence. Besides that the best person to admit or deny this receipt was the complainant but it was never put to her in cross examination, as such, issuance of this receipt by the complainant is not proved.

26. The respondent has also tried to take a plea that a complaint was made to the police station as the complainant and her husband had threatened the respondent. A quarrel took place, therefore, police was called. Any complaint made to the police has not seen the light of the day as no such complaint was filed or proved by the respondent. There is discrepancy in the testimony of the defence witnesses in this regard as according to DW-1, after the entire payment of Rs.35,000/- was made, the complainant along with her husband came to his house and demanded more money. They also threatened the respondent and

her husband. One of the neighbours called the PCR and the matter was reported to P.S. Prashant Vihar. However, according to DW-2, beatings were given by the complainant to the respondent in her presence at her place whereupon she called the police and a complaint was registered. Besides these discrepancies, it was suggested to the complainant that in pursuance to the PCR call given by the accused, both the accused and complainant were taken to P.S. Rohini, however, except for these oral and bald allegations, there is nothing to substantiate these pleas.

27. The cumulative effect of the aforesaid discussion is that the finding of the learned Trial Court that by examining DW1 and DW2, the respondent has been able to cast doubt on the complainant's version is not fortified by record and the findings cannot be sustained.

28. The authorities relied upon by the learned counsel for the respondent do not help the respondent, inasmuch as, in ***John K. Abraham*** (supra), the complainant who had filed the complaint under Section 138 of the Negotiable Instruments Act, was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the respondent. He was not sure as to who wrote the cheque

when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Moreover, the complainant at one stage admitted in cross-examination that the cheque was in the hand writing of accused and the very next moment, took a diametrically opposite stand that it was not in the handwriting of accused and it was written by the complainant himself. Various defects were found in the evidence of the complainant and, as such, the appeal was allowed by setting aside the conviction and sentence imposed upon the accused. Similarly, in ***K. Prakashan*** (supra), the complainant had failed to prove that he had the means to advance the monies and had in fact advanced to the appellant and that he had any commercial dealings with the appellant. As such, it was observed that the complainant failed to discharge the initial burden of proof. In ***M.S. Narayana Menon @ Mani*** (Supra), the accused was carrying on transaction in shares through respondent in stock exchange and allegedly issued cheque for discharge of debt which was dishonoured. Discrepancies were found in the books of accounts maintained by the respondent for proving said transactions. Defence of the accused was that cheque was issued for the purpose of discounting which appeared

to be probable. As such, it was observed that accused discharged his initial burden and the burden shifted upon the complainant which he failed to discharge. *Ibrahim Uddin* (supra), was relied upon by the learned counsel for the respondent primarily for submitting that it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the court may draw adverse inference. All the authorities were on peculiar facts and circumstances and have no application to the case in hand.

29. The reasons given by the Trial Court in the judgment for acquitting the accused are not at all sustainable. It was duly proved by the appellant that a sum of Rs.1 lac was given by her as loan to the respondent in lieu of which a post dated cheque was issued by her which, on presentation, was dishonoured thrice with the remarks “insufficient funds”. Thereafter statutory legal notice was served upon the accused and on her failure to pay the amount, the complaint was filed. There is sufficient evidence to come to the conclusion that the respondent committed the offence punishable under Section 138 of the Act. Hence the order of acquittal by the learned Magistrate has

to be reversed and the accused has to be convicted for the offence punishable u/s 138 of the Act.

30. In the result, this appeal is allowed setting aside the order of acquittal by the Trial Court.

31. Respondent is accordingly convicted for offence u/s 138 of the Negotiable Instruments Act and directed to pay compensation of Rs. two lakhs within a period of 30 days, in default to undergo simple imprisonment for a period of six months.

Copy of the judgment along with Trial Court record be sent back for information and necessary compliance.

(SUNITA GUPTA)
JUDGE

SEPTEMBER 02, 2014
rs/as