

**HIGH COURT OF TRIPURA
AGARTALA**

IA No.01/2023 in Crl.A. No.11 of 2023

Sri Amlan Chowdhury, S/o Shri Mantosh Chowdhury of Madhyapara, PS-R.K.
Pur, Udaipur, Dist-Gomati, Tripura

.....Applicant/Appellant(s)

Versus

1. Sri Abhijit Das, S/o Shri Debabrata Das of Badarmokam, Poultry Road,
under R.K. Pur PS, Udaipur, Dist- Gomati, Tripura

2. The State of Tripura, represented by Secretary-cum-Commissioner, Home
Department, Govt. of Tripura, New Capital Complex, P.O-Lichubagan, P.S.-
West Agartala.

.....Respondent(s)

For Applicant/Appellant(s) : Mr. A. Acharjee, Advocate,
Miss Shreya Sarkar, Advocate,
Mr. Rahul Acharjee, Advocate.

For Respondent(s) : Mr. Samrat Ghosh, Addl. P.P.,
Mr. D.K. Daschoudhury, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

23/08/2023

Heard Mr. A Acharjee, learned counsel for the applicant/appellant,
Mr. Samrat Ghosh, learned Additional Public Prosecutor for the respondent-
State and Mr. D.K. Daschoudhury, learned counsel for the respondent No.1.

2. The Criminal Leave Petition No.07/2023 has been filed after a
delay of 919 days. The applicant/appellant has filed IA No.01/2023 for
condonation of delay. The judgment of acquittal in favour of the respondent
No.1 in a case under Section 138 of the Negotiable Instruments Act, 1881 (NI
Act, *for short*) was passed on 19.11.2018 by learned Judicial Magistrate, First
Class, Udaipur, Gomati District in case No.CR (NI) 30 of 2017. The applicant
had preferred an appeal before the learned Sessions Court, Udaipur, Gomati

District instead of seeking leave to appeal under Section 378(4) of the Cr.P.C before this Court. The Criminal Appeal No.39(4) of 2018 was finally dismissed as not maintainable on 11.03.2022. Even thereafter, the applicant did not prefer any application seeking leave under Section 378(4) of the Cr.P.C; but chose to prefer a Criminal Revision Petition No.21 of 2022. It was directed against the order of the Appellate Court. This Court vide order dated 19.05.2023 observed that there is no infirmity in the order of the Appellate Court. The revision petition is misconceived. Thereafter, learned counsel for the petitioner sought leave to appeal under Section 378(4) of the Cr.P.C in a separate proceeding against the judgment of acquittal dated 19.11.2018 passed by the learned Trial Court which was opposed by learned counsel for the respondent-accused. This Court, therefore, did not make any comments upon the request made by learned counsel for the petitioner. The revision petition was dismissed with an observation that if it is permissible for the petitioner to file a fresh application under Section 378(4) of the Cr.P.C, it is up to the petitioner to do so. The chronology of dates, therefore, shows that there was a delay of 385 days from 29.04.2022 to 19.05.2023. Thereafter, the instant petition had been filed on 12.07.2023. It has occasioned a total delay of 919 days in filing the appeal. Learned counsel for the petitioner has submitted that the delay has been occasioned on account of pursuing wrongful remedies. As such, the delay is not unexplained or inordinate. The applicant/appellant, being an ordinary citizen, may not have been properly advised to pursue the right remedy. Therefore, the delay may be condoned.

3. Mr. A Acharjee, learned counsel for the applicant/appellant, has also drawn the attention of this Court to the findings of the learned Trial Court in the judgment of acquittal. He submits that the ingredients of the offence under Section 138 were satisfied, but the accused has been acquitted of the charges only on the ground that the complainant had not been able to adduce evidence in order to discharge the burden that the cheque in question bearing No.656473 dated 26.05.2017 was issued towards discharge of debt or liability. Learned counsel for the applicant/appellant has relied upon at Paragraph 13 of a decision of the Apex Court in the case of *Rangappa v. Sri Mohan* reported in *(2010) 11 SCC 441* which is reproduced hereunder:

“13. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No.0886322 dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable.”

It is submitted that if the accused has admitted his signature on the impugned cheque, the presumption that the cheque was issued pertaining to a legally enforceable debt or liability is fulfilled. The presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. It is also submitted that the accused has not been able to raise any probable defence for shifting of the onus upon the complainant to show that the cheque was issued for discharge of any debt or liability. However, the learned Trial Court wrongly interpreted the provisions of Section 138 read with Section 139 and Section 118 of the NI Act and acquitted the accused person of the charges.

4. Learned counsel for the applicant/appellant has however, not been able to show from the records and from the impugned judgment that the complainant had adduced any document or been able to show even the date and the manner in which the loan of Rs.2,60,000/- was advanced in favour of the accused. A bland statement was made by the complainant that the loan amount was advanced in June, 2016. However, learned counsel for the applicant/appellant submits that if the delay is condoned and the leave is allowed, then the applicant/appellant would be in a position to demonstrate the infirmities in the impugned judgment from the lower court records so that a proper adjudication on merits of the case of the complainant is made by this Court.

5. Both the learned counsel for the respondent No.1 and respondent No.2-State have strongly opposed the prayer. It is submitted that the manner in which the complainant has invoked one forum after the other repeatedly and allowed the judgment of acquittal to attain finality, the cause shown by the applicant/appellant for condonation of delay is wholly insufficient to be condoned. A double presumption of innocence has accrued in favour of the accused after the judgment of acquittal dated 19.11.2018 which should not be unsettled at the behest of the complainant who is negligent and lacking in due diligence. Both the learned counsel for the respondent No.1 and the State have also submitted that mere fulfillment of the ministerial requirements of presentation of cheque and issuance of return memo by the Bank on account of insufficient fund or the service of notice on the accused and his refusal to pay the amount claimed in lieu of the check, would not suffice to establish a charge

under Section 138 of the NI Act, if the complainant on his own, has not been able to show even the date on which the amount was disbursed or the manner in which it was paid and also there being no document or instrument to show that there was an acknowledgment of the loan between the parties. It is submitted that since the complainant had failed to fulfil the above ingredients, the accused had discharged his burden on the standards of preponderance of probabilities to shift the onus upon the complainant to prove that the loan amount was disbursed and the cheque was issued to discharge any debt or liability on the part of the accused person. Learned counsel for the respondent No.1 and the State submit that the findings of the learned Trial Court on that account are unimpeachable. The learned Trial Court has also relied upon the decisions of the Apex Court which show that it is not necessary for the accused to step in the witness box to prove his defence of rebuttal nature. The onus can be discharged by the accused by raising a probable defence even relying upon the circumstances of the case of the complainant and the evidence adduced on behalf of the complainant. The complainant having failed to discharge the liability under Section 139 of the NI Act, the findings of the learned Trial Court need not require any interference to unsettle the finality attached to the impugned judgment. Therefore, both on merits and on the point of delay, the present application deserves to be dismissed.

6. I have considered the submission of learned counsel for the parties and taken note of the materials placed both from the application seeking condonation of delay and also from the special leave petition. I have also gone through the findings of the learned Trial Court vide judgment dated 19.11.2018

passed by the Court of Judicial Magistrate, First Class, Udaipur, Gomati District in CR (NI) No.30 of 2017. The chronology of dates referred to in the opening paragraphs and taken note of from the delay condonation application in fact, points to a very negligent and casual approach on the part of the complainant in laying a challenge to the judgment of acquittal by invoking the incorrect forum and wrong proceedings. Not only was the appeal preferred against the judgment of acquittal not maintainable before the learned Sessions Court, Gomati District, Udaipur; but even after the appeal was held to be not maintainable by the learned Sessions Court vide judgment dated 11.03.2022, the complainant/applicant herein chose to challenge the judgment of the Appellate Court in a criminal revision petition before this Court being CrI.Rev.P. No.21 of 2022, instead of seeking leave to appeal under Section 378(4) of the Cr.P.C which is the correct remedy. That criminal revision petition was also dismissed by order dated 19.05.2023 by this Court. A plea was raised at the end by learned counsel for the petitioner that petitioner may be allowed liberty to seek leave to appeal under Section 378(4) of the Cr.P.C in a separate proceedings against the judgment of acquittal dated 19.11.2018. The plea was strongly opposed by the respondent-accused. Therefore, this Court only made an observation that if it is permissible for the petitioner to file a fresh application under Section 378(4) of the Cr.P.C, it is up to the petitioner to do so. The observations in no way can be said to clothe the petitioner with a bonafide explanation to justify the filing of an application for leave to appeal against the judgment of acquittal of the learned Trial Court under Section 378(4) of Cr.P.C after such a long delay. Legal remedies are to be pursued with due diligence. In this case the judgment of acquittal has created a double

presumption of innocence in favour of the accused which should not be lightly interfered if the other party/complainant is not prompt in seeking appropriate remedy from the competent forum/court. As such, the petitioner has failed to show sufficient cause for condonation of delay of 919 days in approaching this Court in the present application.

7. Apart from that, learned counsel for the applicant/appellant has sought to draw the attention of this Court to the findings of the learned Trial Court in the judgment dated 19.11.2018 by which the accused was acquitted of the charges. Learned counsel for the applicant/appellant has also sought to rely upon the decision of the Apex Court in the case of *Rangappa* (supra), in particular, Paragraph 13 thereof. The complaint was filed alleging dishonor of Cheque bearing No.656473 dated 26.05.2017 of Rs.2,50,000/- issued on the Tripura Gramin Bank, Chandrapur Branch in favour of the complainant alleging that it is for discharge of a loan amount of Rs.2,60,000/- taken by the accused from the complainant for personal need. On presentation, the cheque had been returned by the Bank due to "Account dormant". A demand notice was also issued by registered post upon the accused stipulating that failing to pay the liability, legal action would be taken. Thereafter, the complaint was filed. The complainant exhibited the following documents:

1. An original cheque bearing No.656473 dated 26.05.2017 for Rs.2,50,000/- marked as **Exhibit-1**,
2. Deposit slip of SBI marked as **Exhibit-2**,
3. Bank Endorsement by Tripura Gramin Bank dated 29.05.2017 marked as **Exhibit-3**,
4. Postal Receipt marked as **Exhibit-4**,
5. Xerox copy of Demand notice marked as **Exhibit-5**,
6. Acknowledgment Card marked as **Exhibit-6**,

7. The account details of Abhijit Das marked as **Exhibit-7** (SO),
8. Registered letter marked as **Exhibit-7**.

Four witnesses were also adduced. The learned Trial Court framed the following points for determination:

“6. The points for determination in this case are:

- *Whether the accused person issued cheque in question to the complainant in discharge of any debt or liability.*
- *Whether the cheque was dishonoured when properly presented for encashment by the complainant.*
- *Whether the complainant made a demand for payment of Rs.2,50,000/- to the accused person within 30 days of dishonor of cheque.”*

8. The findings of the learned Trial Court on Point No.I show that the complainant had not given any details about the payment or produced any evidence in favour of the fact that the loan money was given to the accused person. Learned Trial Court relied upon decisions of the Apex Court and Bombay High Court to hold that it is not necessary for the accused to lead positive evidence to rebut the presumption as it can be rebutted from circumstances on record since the complainant failed to produce even the loan agreement. No date of disbursement of loan of Rs.2,60,000/- and the manner in which it was disbursed were either evidenced. Therefore, the Point No.I was decided in favour of the accused. It held that the complainant had failed to show that the cheque was issued in discharge of any debt or liability by the accused person. The Point No.II was also decided against the complainant as the complainant had failed to mention anywhere that in what form, the loan amount was given; either in cash or in cheque. So far as Point No.III is concerned, it was decided in favour of the complainant wherein the learned Trial Court also cited the decision of the Apex Court in the case of **Dr.Y.N. Rao & Anr. v.**

Nalgonda Distt. Co-operative Central Bank & Ors. reported in 2002(3) Crimes

37. However, on an overall consideration of the matter and the findings rendered on Point No.I and II, the accused was acquitted of the charges. In this background, it is appropriate to refer to the decision of the Apex Court in the case of *Rangappa* (supra) itself cited by learned counsel for the applicant/appellant. Para 20 and 28 thereof are extracted hereunder:

“20. The counsel appearing for the appellant-accused has relied on a decision given by a Division Bench of this Court in *Krishna Janardhan Bhat v. Dattatraya G. Hegde*, the operative observations from which are reproduced below: (S.B. Sinha, J. at SCC pp. 61-63, paras 29-32 & 34)

"29. Section 138 of the Act has three ingredients viz.:

(i) that there is a legally enforceable debt;

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. *Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.*

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused

has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.

* * *

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is 'preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies."

(emphasis supplied)

28. 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. As clarified in the citations, 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."

9. The Apex Court has laid down that 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 to rebut the presumption under Section 139 of the NI Act since the standard of proof for doing so is that of "preponderance of probabilities". 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. In the instant case, the accused has been able to raise such a defence relying upon the materials submitted by the complainant itself. The complainant however failed to discharge his onus to show that the cheque was issued by the accused to discharge any debt or liability on his part. As such, even on consideration of

the plea raised by the applicant/appellant as against the findings of the learned Trial Court, this Court is of the opinion that no tenable grounds on facts or in law are made out to have a relook on the judgment of acquittal rendered by the learned Trial Court as way back as 19.11.2018 because with the passage of time, the judgment of acquittal has attained finality and raised a double presumption of innocence in favour of the accused.

10. On consideration of the totality of facts and circumstances noted above and for the reasons recorded, the application for condonation of delay is dismissed.

11. The petition for granting special leave to file appeal being CrI.L.P. No.07/2023 is also dismissed and consequently, the Criminal Appeal No.11/2023 stands dismissed.

सत्यमेव जयते (APARESH KUMAR SINGH), CJ

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PULAK BANIK Date: 2023.09.22
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