

HIGH COURT OF TRIPURA

_A_G_A_R_T_A_L_A_

Crl. A. No.18 of 2022

1. Shri Milan Paul, son of late Suresh Ch. Paul of Belonia, P.S. Belonia, District: South Tripura, Age-62.
2. Shri Ratan Mallick, son of late Harendra Kr. Mallick of South Sonaichhari, P.O. South Sonaichhari, P.S. Belonia, District: South Tripura, Age-61.
3. Shri Khokan Ch. Bhowmik, son of late Hiralal Bhowmik of Sarashima, P.O. Sarashima, P.S. Belonia, District: South Tripura, Age-58.
4. Shri Bisweswar Datta, son of late Pratap Ch. Datta, resident of Matai, Rajnagar, P.O. Matai, P.S. Belonia, District: South Tripura, Age-60.

.....Appellants.

_V_E_R_S_U_S_

1. Shri Rakhal Mallick, son of late Jatramohan Mallick, resident of College Square, P.O. & P.S. Belonia, District: South Tripura.
2. The State of Tripura through the Public Prosecutor, High Court of Tripura.

.....Accused-respondent.

.....Respondent.

For Appellant(s)	:	Mr. S. Deb, Sr. Advocate.
For Respondent(s)	:	Mr. S. Debnath, Addl. P.P. Mr. P. Majumder, Advocate.
Date of hearing & delivery of Judgment and order	:	13.07.2023
Whether fit for reporting	:	YES

BEFORE

HON'BLE MR. JUSTICE T. AMARNATH GOUD

_F_I_N_A_L_O_R_D_E_R_

Heard Mr. S. Deb, learned senior counsel appearing for the appellants and Mr. S. Debnath, learned Addl. P.P. as well as Mr. P. Majumder, learned counsel appearing for the respondents.

[2] This appeal has been filed under Sub-Section-4 of Section-378 of the Code of Criminal Procedure against the order of acquittal passed by the learned Chief Judicial Magistrate, South Tripura, Belonia in connection with N.I. 27 of 2017 dated 12.04.2022 between Shri Milan Paul and 3 others, complainant and Shri Rakhal Mallick, accused whereby and whereunder the learned trial Judge returned a finding of not guilty against the accused Shri Rakhal Mallick and thus acquitted the accused for the offence punishable under Section-138 of the Negotiable Instrument Act, 1881.

[3] The brief facts of the present case is that one complaint has been filed by the complainants alleging, *inter alia* that all the complainants and the accused person had done business of brick industry and construction works with M/S Vida Engg.Co. Ltd. Kolkata and after departure of the said Vida Engg. Co. Ltd the accused made attorney on behalf of the said Vida Engg. Co. Ltd. to continue with their works at Belonia and in continuation of brick industry business of M/S Santoshi Maa Brick Industry, Sonaichari owned by the complainants and accused, they jointly took loan from SBI, Belonia Branch which became NPA and the residence of Milan Pal was attached as mortgaged land which is located just adjacent to the Belonia P.S and due to liability taken by the accused to pay the bank loan by himself, on 19.12.2016 an agreement was executed by all the partners and during the execution of agreement the accused issued 4 (four) cheques amounting to Rs.10,00,000/-(Rs.Ten Lakh) each in the name of all the complainants on the liability of repay the loan amount to be paid on or before 29.09.2017 and thereafter as the date was coming nearer, the complainants on several times requested the accused to repay the loan amount after deduction of rebate but he did not pay any heed to it and on apprehension of auction of the attached property of said Milan Pal, all the complainants went to SBI, Belonia Branch and paid Rs.13,50,000/- for liquidation of loan as per retirement of partnership deed amongst all the partners.

[4] It is also stated that after execution of agreement the accused also paid loan amount of Rs.15,50,000/- but did not pay the outstanding loan amount of Rs.13,50,000/- and thereafter all the complainants presented their cheques which were issued by the accused at the time of agreement to their respective banks for encashment and all the cheques were dishonored due to closing of account. Thereafter, the complainants issued Legal notice to the accused through their engaged Advocate for payment of the cheque amounts within stipulated period but the accused failed to do so.

[5] Subsequently, a complaint under Section-138 of the Negotiable Instrument Act was filed in the Court of the learned Chief Judicial Magistrate, Belonia, South Tripura and after having taken cognizance of the same, notice was issued upon the respondent No.1 to which the respondent No.1 pleaded not guilty. The complainant themselves were examined as PWs.1, 2, 3 and 4 while PWs-5, 6 and 7 proved into evidence certain other documents. PWs-1, 2, 3 and 4 proved into evidence the cheques being numbered as 360093, 360094, 360095 and 360096 dated 31.07.2017. They also proved into evidence the return memo issued on 24.10.2017 by the concerned bank intimating the dishonor of the cheques.

[6] After hearing the parties and having gone through the material evidence on record, the learned Court below has observed as under:

“As such, I hold that accused has remained successful in rebutting the mandatory presumption of law drawn in favour of the complainant.

I, accordingly return a finding of not guilty against the accused Sri Rakhal Mallik.

The accused Sri Rakhal Mallik is hereby acquitted for the offence as punishable under Section 138 N.I.Act, 1881.

The surety of the accused person also stand discharged from his respective liability of the bail bond.”

[7] Mr. S. Deb, learned senior counsel appearing for the appellants in support of his case has submitted that the learned trial Court has committed manifest error of law and facts in appreciating the facts and circumstances of the case in acquitting the respondent No.1. The learned Court below has erred in holding that only photocopy of the return memo was submitted but, the records would reveal that except one, all other original return memos were filed and even the photocopy of one of the said return memo has been admitted into evidence without any objection by and on behalf of the respondent No.1.

[8] The learned Court below has overlooked the reply filed on behalf of the respondent No.1 through his learned advocate on 20.11.2017 wherein, he admitted his in-debteness. The learned Court below has arrived at a wrong decision as to the legal demand notice and in so arriving he misconstrued and misunderstood the decision in *Suman Sethi v. Ajay K. Churiwal and another* reported in (2000) 2 SCC 380 which was a case where in addition to the dues under the cheques certain other payments were asked for and in that backdrop the Apex Court referred to the decision of the High Court which set aside the decision of the learned trial Judge holding that the notice was valid one and the High Court on finding that the amounts in the notice being severable did not interfere with the finding of the High Court.

[9] The Hon'ble Apex Court in *K. R. Indira v. Dr. G. Adinarayana*, reported in (2003) 8 SCC 300 held that if a consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, the mere fact that it was a consolidated notice and/or that further demands in addition to the statutorily envisaged demands were also found to have been made may not invalidate the same. The learned Court below misunderstood and misconstrued the decision referred in *Rangappa v. Sri Mohan* (2010) 11 CC 441 wherein, the question that fell for consideration was that the accused respondent

claimed that the cheque in question was a blank cheque bearing his signature which had been lost and it had come into the hands of the complainant who had then tried to misuse it wherein, the Apex Court held that the existence of a cheque signed by the drawer of the cheque raises a rebuttable presumption and it is open to the accused to raise a defence wherein, the existence of the legally enforceable debt or liability can be contested but, indisputably there can be no doubt there is an initial presumption which favours the complainant and the quotation from **Rangappa** (supra) speaks of proportionality in the matter of sentencing.

[10] The learned Court below has failed to appreciate that in the conclusion of the complaint petition itself, the complainant appellant applicants specifically stated that the complainants could claim the full cheque money but they did not do it due to their honesty and sincerity and to remain friend with accused in future. Similarly in the prayer, the complainant appellant also stated under the above circumstances, learned Court shall be pleased to take cognizance of the offence under Section-138 of N.I. Act after observing all the formalities and shall issue process in the name of accused to stand in the trial and on the event of trial, the learned Court shall be pleased to convict the accused adequately apart from recovery of cheque part demanded amount and oblige thereby.

[11] The learned Court below has committed manifest error of law in arriving at the decision that the accused has successfully rebutted mandatory presumption of law and also successfully controverted the story of the complainant and has wrongly and illegally arrived at the opinion referring to the business and other facts including that the cheques were allegedly issued on 19.12.2016 while the cheques themselves bear the date i.e. 31.07.2017.

[12] In support of the case of the appellants, Mr. Deb, learned senior counsel has placed his reliance on a decision of the Apex Court in **Rohitbhai Jivanlal Patel v. State of Gujarat and Another**, reported in (2019) 18 SCC 106, wherein, the Court has held thus:

“6.1. The High Court observed that if the transaction in question was not reflected in the accounts and income-tax returns, that would at best hold the assessee or lender liable for action under the income-tax laws but, if the complainant succeeds in showing the lending of amount, the existence of legally enforceable debt cannot be denied. The High Court also observed that the issue regarding washing away of the cheques in rain water was of no significance when the accused had accepted his liability in clear terms. The High Court found that the defence plea of the accused that the money was given as hand loan by his friend Shri Jagdishbhai got falsified by the version of the said Shri Jagdishbhai, who was examined as a witness on behalf of the complainant. The High Court, therefore, set aside the impugned orders and, while convicting the accused-appellant for the offence under [Section 138](#) of

the NI Act, sentenced him in the manner noticed hereinbefore. The High Court, inter alia, observed and held as under:

62. It is necessary at this stage also to refer to the emphasis laid by the learned counsel appearing for the respondent No.2 on the source of the fund which has been lent by the appellant. It has emerged from the detailed examination of the record, as also detailed examination-in-chief as well as cross-examination, that the complainant runs the business. He also maintains the books of account and he has his own factory in the name and style of 'Ashirwad Enterprise' and manufactures plastic. The said factory is situated at Jambusar. Ordinarily, any prudent business person would prefer to transact by cheque while lending money, but it is quite often noticed that the cash transactions in the business would allow huge sum of money as cash, which sometimes are shown in the books of account as cash on hands or otherwise as amount available on books. Assuming that cheque transaction of lending of amount is absent and income-tax returns also do not reflect such amount, that at the best would hold the assessee or lender liable for action under the Income-tax laws. However, otherwise, if he succeeds in showing lending of such amount, both by oral evidence of himself and his friend, on whom even respondent No.2 relies upon and from the writing of the respondent No.2 given separately along with seven cheques signed by him, what possible reasons could weigh with the Court to deny the existence of legally enforceable debt in such glaring circumstances.

63. Considering the fact that the complainant maintains his books of account, coupled with the fact that the respondent No.2 had merely refuted on flimsy ground of his having transacted with witness Jagdishbhai and not with the complainant, has failed to discharge the burden which had shifted upon him. It is to be noted that the respondent No.2 has admitted his signature on the impugned cheque. At no point of time, the cheque has been disputed. Once this fact is acknowledged that the signature on the cheque is that of the respondent No. 2-accused, [section 139](#) of the Negotiable Instruments Act would mandate the presumption that the cheque concerns a legally enforceable debt or liability. Of course, this presumption is in the nature of rebuttal and onus is on the accused thereafter to raise a probable defence.

64. As can be noted from the chronology of events and the material that has been placed before this Court that the defence raised by the accused is not at all probable. The respondent No.2-accused states that the money was given as a hand loan by his friend Jagdishbhai and not the appellant, also gets falsified completely by the version of Jagdishbhai. It appears that in case of all the seven cheques when notices were given prior to the filing of the complaint, he has chosen not to reply to four of the notices. Either on account of insufficiency of the funds or because he has closed account that the cheques could not be realized. All these circumstances cumulatively lead this Court to conclude that the appellant succeeded in proving the legally enforceable debt and no probable defence for rebutting the statutory presumption is raised by the respondent No.2.

65. Initial presumption as contemplated under [section 139](#) of the Negotiable Instruments Act, when the proof of lending of the money and acceptance of the signatures on the cheques, shall need to be raised by the Court in favour of the appellant.

* * * * *

70..... Reasonably, when the appellant had proved the legally enforceable debt, not only through his own evidence, but also through the evidence of his friend Jagdishbhai and also other contemporaneous record, more particularly, the document at Exhibit 24, which is a writing by which the respondent No.2 clearly indicates and accepts his liability to the tune of Rs. 22.50 lakh. Thus, the burden had shifted upon the respondent No. 2. The presumption which was

needed to be drawn by the Court under [section 118](#) of the Negotiable Instruments Act would oblige the Court to presume that the cheque had been issued for consideration and until contrary is proved, such presumption would hold the ground. Except the bare denial, nothing has been found to come on record to dislodge the positive proof that has been adduced by the appellant.

71. In the opinion of this Court, the entire argument that the rainy water could not have washed away the cheques, pales into insignificance and is not argument worth consideration, more particularly, when the respondent-accused in no unclear terms had accepted his liability of his having accepted the amount of Rs. 22.50 lakh from the complainant and it also declared the issuance of seven cheques of particular dates towards such legally enforceable debt. If it was an understanding between the parties qua issuance of fresh cheques, with an ostensible reason of old cheques having washed away, those are the non-issues. This Court cannot be oblivious of the fact that [section 138](#) of the Negotiable Instruments Act has been made a penal provision not only for the cheques to give acceptability in the transaction, but it is the economic blood-line of the country and, therefore, the law makers have made the special rules of evidence by introducing [sections 118](#) and [139](#) of the Negotiable Instruments Act.

72. The trial Court has committed a serious error by not discharging its obligation of recognizing the evidentiary value and not appreciating the positive evidence which led to the reasonable proof of legally enforceable debt existing on the side of the original complainant."

[13] ***In Rangappa v. Sri Mohan : (2010) 11 SCC 441***, this Court has reiterated and summarized the principles relating to presumptions under Sections 118 and 139 of the NI Act and rebuttal thereof in the following:-

"26. In the light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it is based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttal presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. 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 defendant-accused cannot be expected to discharge an unduly high standard of proof.

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."

[14] During argument learned counsel appearing for the respondent No.1 strongly submitted that alleged cheques were deposited beyond the period of limitation, i.e. after 06 months of issuing the same. He has also strongly disputed the Xerox copy of the return memo of cheque, i.e.Exbt.1 and on perusal of the record it is also found that only Xerox copy of return memo of Ext.1 was adduced by the complainant Khokan Ch. Bowimik. From the record this Court finds that vide order dated 19.02.2019 the learned Court below has rejected the prayer of complainant to prove the said Xerox copy of return memo by adducing the evidence of Bank officials and thereafter complainant made criminal revision before the learned Sessions Judge, Belonia and learned Sessions Judge in Crl. Rev.02 of 2019 pleaded to dismissed the same and hence, the Xerox copy of return memo of Ext. 1 cannot be read in evidence.

[15] In support of his case Mr. Majumder, learned counsel appearing for the respondent No.1 has placed his reliance on a decision of the Apex Court in ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel and Another***, reported in (2023) 1 SCC 578 wherein, the Court has observed thus:

"20. The judgments of this Court on post-dated cheques when read with the purpose of Section 138 indicate that an offence under the provision arises if the cheque represents a legally enforceable debt on the date of maturity. The offence under Section 138 is tipped by the dishonour of the cheque when it is sought to be encashed. Though a post- dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing, for the offence to be attracted, the cheque must represent a legally enforceable debt at the time of encashment. If there has been a material change in the circumstance such that the sum in the cheque does not represent a legally enforceable debt at the time of maturity or encashment, then the offence under Section 138 is not made out.

21. The appellant contended that the cheque was issued by the first respondent on 17 March 2014. However, the payment of rupees 4,09,3015 received from the first respondent was between 8 April 2012 and 30 December 2013. It was contended that since the payments were made before the issuance of cheque, it cannot be considered as part-payment for the discharge of liability.

22. The appellant in his cross- examination conducted on 17 March 2016 has categorically mentioned that he did not take any receipt on lending rupees twenty lakhs to the first respondent. The appellant stated that a 'cheque against the cheque' was given. The relevant portion of the cross-examination is extracted below:

"[...] I have paid the Income Tax Return for the accounting year 2012-13. It is true that I have shown the transaction of Rupees Twenty Lakhs in the said return. I am ready to present the Income Tax Return for the Accounting Year

of Rupees Twenty Lakhs to the Accused; I have not acknowledged the receipt. It is true that I have given the cheque against the said cheque and not taken the receipt.” (emphasis supplied).

23. In the testimony recorded under Section 145 of the Act, the appellant stated that he lent the first respondent a sum of rupees twenty lakhs on 16 January 2012 and that the respondent gave a cheque of rupees twenty lakhs stating that it may be deposited on the date specified in it:

“The plaintiff and the Defendant of this case being a Vevai and has a house-like relationship, he has given the amount to the plaintiff as per his requirement on dated 16.1.2012 and for the payment of the amount paid by the Plaintiff to the in this case, his bank State Bank of India, AUDa Garden, Prahladnagar Branch, Ahmedabad Cheque Number: 8877828 of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) and stated that the above cheque was deposited by the plaintiff on the date specified in it giving the plaintiff the firm confidence and assurance that the plaintiff would definitely get the amount due from us.” (emphasis supplied) Further, in the cross-examination, the appellant stated that the amount that was paid by the first respondent was not paid as a reward or gift:

“I cannot say whether the accused has also paid me this amount in the count of Rupees Twenty Lakhs. The accused did not even give me that amount as a reward/gift.”

24. It was the contention of the first respondent that the cheque was not dated. On the other hand, it was the contention of the appellant that the cheque was dated 17 March 2014. The Courts below did not record a finding on whether the cheque was un-dated or was dated 17 March 2014. However, it was conclusively held that the cheque was issued by the first respondent for security on the date when the loan was borrowed. It was also categorically recorded by the Courts below that a sum of rupees 4,09,315 that was paid by the first respondent was paid to partly fulfil the debt of rupees twenty lakhs. The appellant in his cross-examination has stated that a ‘cheque against a cheque’ was given when he loaned the sum of rupees twenty lakhs. Thus, it can be concluded that the cheque was given as a security to discharge the loan, either undated or dated as 17 March 2014. Merely because the sum of rupees 4,09,315 was paid between 8 April 2012 and 30 December 2013, which was after 17 March 2014, it cannot be concluded that the sum was not paid in discharge of the loan of rupees twenty lakh. The sum of rupees 4,09,315 was paid after the loan was lent to the first respondent. The appellant in his cross-examination has not denied the receipt of the payments. He has also stated it was not received as a ‘gift or reward’. In view of the above discussion, at the time of the encashment of the cheque, the first respondent did not owe a sum of rupees twenty lakhs as represented in the cheque at the time of encashment of the cheque that was issued for security.

25. The High Court while dismissing the appeal against acquittal held that the notice issued by the appellant is an omnibus notice since it does not represent a legally enforceable debt. Relying on the judgment of this Court in *Rahul Builders v. Arihant Fertilizers & Chemicals*⁹, it was held that the legal notice was not issued in accordance with proviso (b) to Section 138 since it did not represent the ‘correct amount’. The appellant has contended that the requirement under Section 138 is to send a notice demanding the ‘cheque amount’. It was contended that the offence under Section 138 was made out since the appellant in the statutory notice demanded the payment of rupees twenty lakhs which was the ‘cheque amount’.

26. Section 138 of the Act stipulates that if the cheque is returned unpaid by the bank for the lack of funds, then the drawee shall be deemed to have

committed an offence under Section 138 of the Act. However, the offence under Section 138 of the Act is attracted only when the conditions in the provisos have been fulfilled. Proviso (b) to Section 138 states that a notice demanding the payment of the 'said amount of money' shall be made by the drawee of the cheque.

This Court has interpreted the phrase 'the said amount of money' as it finds place in proviso (b) to Section 138. In *Suman Sethi v. Ajay K Churiwal*¹⁰, the appellant issued a cheque for rupees twenty lakhs in favour of the first respondent. The cheque was dishonoured. A demand notice for an amount higher than the cheque amount was issued. A two-Judge Bench of this Court held that the demand has to be made for the 'said amount', which is the cheque amount. It was also observed that the question of whether the notice demanding an amount higher than the cheque amount is valid would depend on the language of the notice:

"8. It is a well-settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost etc. whether 9 (2008) 2 SCC 321 10 (2000) 2 SCC 38 the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad."

[16] After hearing the legal representatives of the parties and having observed the observations made in different citations, let us revisit the evidence and application of law and the facts of the instant case. The respondent No.1 admitted of issuing of 04 cheques vide Exbt.2 i.e. to say in reply of notice but at the same time he submitted that the issuing of cheques was not voluntary and the said cheques were acquired on mistreatment of the complainants. Although he denied having given cheques to the complainants voluntarily in reply of notice as well as during examination u/s 313 of Cr.P.C. but he did not substantiate his denial with any evidence.

[17] Hon'ble Apex Court in *Suman Sethi v. Ajay K. Churiwal and Another*, reported in (2000) 2 SCC 380 has held thus: "8. It is a well-settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made

without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad.

[18] What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case as it did not specifically contain any demand for the payment of the cheques amount, the non-compliance with such a demand only being the incriminating circumstance which exposes the drawer for being proceeded against under Section 138 of the Act.

[19] In the present case it is seen that the 04 cheques, i.e., Exbt.1 cheque bearing No. 360094 dated 31.07.2017, (return memo is xerox copy) Exbt.5 cheque bearing No. 360093 dated 31.07.2017, Exbt. 6 return memo, Exbt.10 cheque bearing No. 360095 dated 31.07.2017, Exbt. 11 return memo, Exbt. 8 cheque bearing No. 360096 dated 31.07.2017 and Exbt. 9 return memo, were issued for an amount of Rs.40,00,000/- (Rs. 10,00,000/- x 4) but the demand notice was made for payment of only Rs. 13,50,000/-. Hence, the notice in question is imperfect in this case as it did not specifically contain any demand for the payment of the cheques amount.

[20] It is seen that the 04 cheques, i.e., Exbt.1 cheque bearing No. 360094 dated 31.07.2017,(return memo is xerox copy) Exbt.5 cheque bearing No. 360093 dated 31.07.2017, Exbt. 6 return memo, Exbt.10 cheque bearing No. 360095 dated 31.07.2017, Exbt. 11 return memo, Exbt. 8 cheque bearing No. 360096 dated 31.07.2017 and Exbt. 9 return memo, were issued for an amount of Rs.40,00,000/- (Rs. 10,00,000/- x 4) but the demand notice was made for payment of only Rs. 13,50,000/-. Hence, the notice in question is imperfect in this case as it did not specifically contain any demand for the payment of the cheques amount.

[21] Once the fundamental ingredients which gives rise to cause of action under Section-138 of N. I. Act have been established a mandatory presumption under Section-139 of N. I. Act, is effected in favour of complainant and it also extends to the existence of legally enforceable liability itself. A three judged bench of Hon'ble Apex Court in ***Rangappa v. S. Mohan, reported in (2010) 11 SCC 441*** has held that:

“In the light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To the extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way case doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence

wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.”

[22] Hon'ble Apex Court in **Rangappa v.S. Mohan** decided on 07.05.2010 has further held that *“However, it must be remembered that the offence made punishable by Section 138 N. I. Act 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 transaction. 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 of 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 N. I. Act, 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.”*

[23] In the instant case complainants alleging that all the complainants and accused person had done business of brick industry and construction works with M/S Vida Engg. Co. Ltd. Kolkata and after departure of the said Vida Engg. Co. Ltd the accused made attorney on behalf of the said Vida Engg. Co. Ltd to continue with their works at Belonia and in continuation of brick industry business of M/S Santoshi Ma Brick Industry, Sonaichari owned by the complainants and accused, they jointly took loan from SBI, Belonia Branch which became NPA and mortgage land of Milan Paul i.e. his residence was attached and they prepared deed of addendum where as a deed of retirement of partners from the partnership firms was executed on 28.06.2013, SL NO. 2640/2013 and as per said deed (para - 8 at page -10) Milan Paul, Khokan Ch Bhowmik and Rakhal Mallik has joint liability to release the mortgage properties of various bank loan accounts.

[24] It is further alleged that after many differences between the existing and retired partners regarding the outstanding loan they agreed Asish Datta (Arbitrator) that Rakhal Mallik takes full and final responsibility for release the mortgage properties by liquidating the outstanding balance of SBI A/C No. 11866553823 (C/C) and other partners shall not liable for outstanding balance,

therefore, accused Rakhal Mallik issued 04 cheques in total of Rs. 40,00,000/- i.e. Rs. 10,00,000/- each to the Khokan Ch. Bhowmik, Milan Paul, Bisweshwar Datta and Ratan Mallik vide No. 360094, 360093, 360096 and 360095 post dated on 19.12.2016 A/C No. 34015610600 of SBI on the condition that they deposited the said cheque in their bank account for encash if Rakhal Mallik fails to release the mortgage properties by liquidating the outstanding balance on or before 31.07.2017. Complainants also stated that accused person fail to release the mortgage properties then he shall pay the government value of those mortgage property to their respective owners and accused takes necessary steps for enfranchise mortgage property of said loan account if bank authority will take physical possession of any mortgage property then owner of said property has every right to deposit said cheque for encash and he has every right to take appropriate legal steps against the accused for outstanding balance of acquired property and the complainants also agreed to return the said cheques to the accused if he able to release the mortgage properties.

[25] It is also stated in deed of addendum that this liability not be affected by any kind of concession or indulgence or by the death or insolvency of Rakhal Mallik and his estate and all movable and immovable assets also as surety for all sums to be paid to liquidating outstanding bank loan. Thereafter the accused failed to pay the loan amount to the SBI then all the complainants deposited their cheques in their account on 31.07.2017 but the cheques were dis-honoured due to closing of account. It is further case of the complainants that they informed the matter to the accused person but the accused person did not pay any heed after which, a legal demand notice was sent to the accused and also requested the accused person to make payment within 15 days from the date of receipt of said notice and it is evident that on 09.11.2017, accused person received the said demand notice and inspite receiving of notice the accused did not take any step to liquidate his liability then the complainant's were constrained to file the present case.

[26] Learned counsel for the appellants submitted that once a cheque has been executed. The mandatory presumption under Section-139 of N.I. Act is effected in favour of the complainant and in the instant case by the deed of addendum i.e. Exbt.3, complainant proved legal debt and liabilities. Learned counsel further submitted that in reply to the notice i.e. to say Exbt.2, OP/accused person admitted about the cheque amount and existence of partnership firm on the basis of which the deed of addendum was executed.

[27] On the other hand, learned counsel for the respondent No.1 submitted that if there is a partnership firm then as per provision of 141 of N.I. Act all the partners are jointly liable to liquidate their loan amount. Ld. counsel further submitted that the original deed i.e. the deed of retirement of partnership which was executed as per the complainant (Deed of Addendum ,i.e. Ext.3) on 28.06.2013, Sl. No. 2640/13 was not placed before the court and it is also admitted by the complainants in their cross-examination. Learned counsel seriously disputed and denied the legal debt and liability on accused person on the ground that on the date of execution of cheque as alleged by the complainant there was no existing debt or liabilities. In the present case, for the purpose of ready reference reproducing the cross-examination the complainants, i.e. PW 1, PW 2, PW 3 and PW 4 which are somewhat similar in nature as thus: *"...It is a fact the hand writing and ink used for writing the date in his cheque is different that of the ink and hand writing of the remaining portion of the same but they did not submit any document as regard alleged appointment of the accused as the Attorney on behalf of Vida Engineering Co. Ltd and also did not submit any document regarding their partnership with the accused in connection with 14.01.2019 Santoshi Ma Brick Industries. They had not submitted any document in this case regarding any dissolution of their partnership and did not submit any document that their partnership firm is indebted to the State Bank of India, Belonia Branch for an amount of Rs. 40,00,000/-. They did not submit any authenticated document of their partnership Account No. 11866553823 lying with the SBI, Belonia Branch and also did not submit any document of the concern bank about their liabilities of their partnership firm and their partnership firm with the accused has not yet been dissolved. They did not submit the document in respect to appointment of Ashish Datta as the arbitrator and the award meant for the same...."*

[28] On perusal of the record it is found that complainant did not adduce the original deed of partnership and accordingly not exhibited the same. Furthermore Sri Asish Datta (arbitrator) was not cited as a witness by the complainants and no original A/C No. 11866553823 (C/C) was submitted and exhibited. Moreover, at the time of preparation of deed of addendum 03 persons namely Raiharan Majumder, Ashis Datta and Umesh Majumder put their signatures as a witnesses but they were not examined by the complainant and in respects of cheques, as per deed of addendum, were issued on 19.12.2016 and it is deposited in the bank on 31.07.2017 i.e. to say beyond the period of limitation i.e. six months. Thus, this Court is also of the opinion that the accused has successfully rebutted the mandatory presumption of law and also successfully controverted the story of the complainant.

[29] Complainant in his complaint petition as well as in examination-in-chief stated that they have been doing business of brick industries and construction work of the M/S Vida Engineering Company Ltd., and the accused was made attorney on behalf of the said Vida Engineering Company Ltd. but no document is placed by the complainants to prove the same and it is also admitted by the complainants in their cross-examination. The complainant is also failed to prove that on the day of issuing of cheque the liability of accused was equivalent to the cheque amount. As per Exbt.2, i.e. the reply of notice to accused person and he admitted that there has been a debt of Rs.29,00,000/- with SBI, Belonia Branch in the name of partnership firm.

[30] It is also stated by the complainant that during continuation of M/S Santoshi Maa Brick Industries, Sonaichari, the complainant and accused jointly took loan from SBI, Belonia and which became NPA and for that purpose land of Milan Pal was mortgaged but no such documents was adduced by the complainant to prove the above fact before the court and it is also admitted by the complainants in their cross-examination. Complainant stated that on the basis of deed of addendum accused had taken liability to liquidate the outstanding balance of SBI account No. 1186553823(CC) but no such bank account is proved before the court and the original deed of retirement was also not placed before the court which was executed as alleged in the deed of addendum on 28.06.2013 Sl. No. 2640/2013. Notice issued by the complainant for the payment of bounced cheque amount is not contain cheque amount, as discussed above, hence, the notice in this connection is imperfect as it did not specifically content in demand for the cheque amount.

[31] For the purpose of reference, Section-141 of the Negotiable Instruments Act, 1881 concerns itself with situations where the offence of dishonour of cheque, as provided under Section 138, is committed by a company (including a partnership firm). This section mandates that when a company commits an offence under Section-138, *every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly*. However, if any person so liable is able to prove that he/she was unaware of the commission of the offence or that he/she had exercised due diligence for preventing the commission of the offence, then such person can escape liability.

[32] Sub-clause (2) of this provision lays down that when “*it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Therefore, it can be deduced that when a partner of a firm is directly responsible for and in-charge of the conduct of the business matters of the firm, he/she can be held liable for the offence along with the company.*”

[33] Section-138 creates a deeming offence. The provisos prescribe stipulations to safeguard the drawer of the cheque by providing them the opportunity of responding to the notice and an opportunity to repay the cheque amount. The conditions stipulated in the provisos need to be fulfilled in addition to the ingredients in the main provision of Section-138. It has already been concluded above that the offence under Section-138 arises only when a cheque that represents a part or whole of the legally enforceable debt at the time of encashment is returned by the bank unpaid. Since the cheque did not represent the legally enforceable debt at the time of encashment, the offence under Section-138 is not made out. The judgments on which learned senior counsel has placed his reliance have no relevance on the present facts and circumstances of the case.

[34] This Court has no hesitation to hold that the judgments referred by Mr. S. Deb, learned senior counsel appearing for the appellants i.e. ***Rohitbhai Jivanlal Patel v. State of Gujarat and Another*** and Rangappa v. Sri Mohan, are not relevant to the facts of the case and this Court places reliance on the conclusion given by the Hon’ble Apex Court in ***Suman Sethi v. Ajay K. Churiwal and another*** reported in (2000) 2 SCC 380 and which was also dealt in ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel and Another***, reported in (2023) 1 SCC 578 wherein, the Apex Court in the light of the requirement under Section-138 of NI Act has specifically dealt with the ingredients leading to the cause of action as said amount i.e. the cheque amount.

[35] The subject matter involved in this petition is not the cheque amount but, it is a settlement of account of the transaction made is the amount made under the demand notice i.e. Rs.13,50,000/- but whereas the cheque amount is Rs.10,00,000/- each x 4 = Rs.40,00,000/-. Since, litigation under Section-138 is purely technical in nature, the scope of the same cannot be enlarged.

[36] Having regard to the evidence on record and the discussion made hereinabove, this Court is of the view that the appellants have failed to prove their

projected case against the respondent No.1 and consequently, the instant appeal preferred by the appellants stands dismissed. Hence, the order of acquittal recorded by the learned Court below does not deserve any interference. The Judgment and order of acquittal passed by the learned Court below is affirmed. As a sequel, miscellaneous applications pending, if any, shall stand closed. Send down the LCRs forthwith.

JUDGE

A. Ghosh

ANJAN
GHOSH

Digitally signed
by ANJAN GHOSH
Date: 2023.07.17
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