

**HIGH COURT OF TRIPURA
AGARTALA
CRL. A NO.23 OF 2022**

Shri Babul Chandra Bhowmik,
Son of Late Lalit Chandra Bhowmik,
Aged about 68 years, resident of North Julaibari,
P.O.- Julaibari, P.S.- Baikhora, District-South Tripura.

..... **Appellant(s)**

Vs.

1. Shri Mihir Kanti Baidya,
Son of Late Manmohan Baidya,
Resident of Village- ONGC Colony(On the southern side of
Satsang Bihar, Badarghat), P.O.- ONGC, P.S. A.D. Nagar, Sub-
Division- Agartala, District- West Tripura.

2. The State of Tripura.

.....**Respondent(s)**

For the Appellant(s) : Mr. S. Lodh, Advocate.
Ms. A. Saha, Advocate.

For the Respondent(s) : Ms R. Guha, Advocate.
Mr. S. Ghosh, Addl. P.P.
Ms. S. Debnath, Advocate.

Date of hearing : 14.09.2023

Date of delivery of
Judgment & Order : 19.09.2023.

Whether fit for reporting : YES.

**HON'BLE MR JUSTICE T. AMARNATH GOUD
JUDGMENT AND ORDER**

This present appeal has been filed under Section 378(4) of Criminal Procedure Code, 1973 against the impugned Judgment dated 19.09.2022, passed by the learned Judicial Magistrate First Class, Belonia, South Tripura in N.I. 15 of 2019,

whereby the learned Judicial Magistrate acquitted respondent No.1 for committing an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. The brief fact of this case is that based on a complaint filed by the complainant-appellant alleging that he is the owner of a brick kiln and also executes construction works under the Public Works Department of State of Tripura and the accused is also a fellow brick kiln owner having two brick manufacturing units one at Jirania and another at Sekerkote under West Tripura District. In the 1st week of April, 2019 the accused person at the time of sending off his migrant labourers, which were brought from outside of the State of Tripura, approached the complainant to give him a personal loan. Accordingly, the complainant gave the accused-respondent No.1 Rs. 40,00,000/- from his bank account lying with the State Bank of India, Sabroom Branch. It is also contended that at the time of taking that loan from the complainant, the accused gave assurance to him that he would repay the same within a short period. Thereafter to discharge liability, the accused person issued two cheques bearing No. 105946 dated 20.05.2019 amounting to Rs. 20,00,000/- and another Cheque No. 105947 dated 22.05.2019 amounting to Rs. 20,00,000/-drawn on State Bank of India, ONGC Colony Branch, Agartala, West Tripura. On 18.07.2019 the complainant deposited the said cheques to his

bank account in the State Bank of India, Sabroom Branch, South Tripura. Thereafter on 29.07.2019 Manager of the State Bank of India, Sarboom Branch, South Tripura returned the said cheques with remarks, "Fund Insufficient". A legal demand notice dated 12.08.2019, was sent to the accused requesting the accused person to make payment within the stipulated period from the date of receipt of said notice, but in spite of having the notice duly served upon the accused on 13.08.2019, the accused did not take any step to liquidate his liabilities by making the payments to the complainant towards the amount covered under the said cheques.

3. Accordingly, the appellant filed a complaint before the learned Chief Judicial Magistrate, South Tripura, Belonia and after taking cognizance, the learned Chief Judicial Magistrate transferred the complaint before the learned Judicial Magistrate, First Class Belonia, South Tripura, for disposal.

4. The learned Court below issued a summon upon respondent No.1 and in response to the summon, he appeared before the learned Court below. On 21.08.2021, respondent No.1 was examined under Section 251 of Cr.P.C., to which he pleaded not guilty and claimed for trial. To prove the case, on behalf of the complainant side, one witness, i.e., the complainant himself was examined as P.W.-1 and proved 7(seven) documents. On the other hand, on behalf of respondent No.1, he himself appeared before

the witness box as D.W.-1 and did not produce any document. After hearing the parties, learned Judicial Magistrate First Class, Belonia, South Tripura vide impugned Judgment and Order dated 19.09.2020, acquitted respondent No.1.

5. Being aggrieved by the impugned Judgment dated 19.09.2022, passed by the learned Judicial Magistrate, 1st Class, Belonia, South Tripura in N.I. No.15 of 2019, the appellant preferred this instant appeal praying to set aside the impugned order.

6. Heard Mr. S. Lodh, learned counsel assisted by Ms. A. Saha, learned counsel appearing for the appellant as well as Mr. R. Guha, learned counsel appearing for private respondent No.1, and Mr. S. Ghosh, learned Addl. P.P. appearing for State-respondent.

7. Earlier this Court upon the request of the learned counsels appearing for both sides has taken steps for settling this matter out of Court. Despite the best efforts of the counsels, they represented that the matter could not be settled outside the Court and prayed to proceed with the matter on merits.

8. Mr. Lodh, learned counsel appearing for the complainant-appellant submits that the learned Court below failed to appreciate the evidence on record and passed the impugned Judgment. The Court below ought to have convicted respondent No.1 as the prosecution has proved the charge against respondent

No.1 herein. At the time of cross-examination, respondent No.1 failed to rebut the presumption of Section 139 of N.I. Act, thus the findings of the learned Court below with regard to legally enforceable debt is erroneous. The learned Court below committed an error in holding that the appellant did not produce any document, whereby, it is established that he made a payment of Rs.40,00,000/- to respondent No.1. The learned Court below at the time of evaluating the evidence on record, did not take into consideration the examination-in-chief submitted by the respondent No.1, whereby, he admitted that he issued 2(two) cheques, amounting to Rs.20,00,000/- each, and he also admitted that he purchased bricks on credit from the appellant. It is submitted that when the accused has admitted to taking of loan and issuance of cheques, the learned Court below ought to have taken presumption under Section 139 of N.I. Act and hold that the accused person has issued the cheques against the legally enforceable debts. The learned Court below failed to appreciate the aforesaid legal position. The learned Court below failed to appreciate that respondent No.1 at no point in time denied his signature on the Cheque and hence there is a statutory presumption of the existence of legally enforceable debts, hence, the findings of the learned Court below are liable to be interfered with.

In addition to support his argument on proving that transaction is not required in complaint under Section 138 of N.I. Act , learned counsel appearing for the appellant referred to **para-11** of the Hon'ble Supreme Court Judgment reported in **2021 SCC Online SC 1191** titled as **K.S. Ranganatha Vs. Vittal Shetty** which is reproduced here-in-under:-

"11. The position of law as noted above makes it crystal clear that when a cheque is drawn out and is relied upon by the drawee, it will raise a presumption that it is drawn towards a consideration which is a legally recoverable amount; such presumption of course, is rebuttable by proving to the contrary. The onus is on the accused to raise a probable defence and the standard of proof for rebutting the presumption is on preponderance of probabilities."

Stating thus, he prayed to allow this appeal.

9. On the other hand, Ms. R. Guha, learned counsel appearing for respondent No.1 submits that legally enforceable debt is not proved. Though in the cross-examination, the complainant-appellant said that he paid Rs.26,00,000/- in total to respondent No.1 through four cheques, and with interest, those amounts increased to Rs.40,53,66/-, but the appellant-complainant has not submitted any documents which show that he made any payment to respondent No.1 from his SBI Account, Sabroom Branch. There is no clarity on how the money for given, why it was given, and for which purpose it was given. The story of the complainant that on good faith he has given the said amount of money to respondent No.1 is not believable at all.

To support his argument on the point of legally enforceable debt to be proved, learned counsel appearing for respondent No.1 pressed into service **paras-9-11** and **paras-13 to 32** of the Hon'ble Apex Court Judgment reported in **(2019) 5 SCC 418** titled as **Basalingappa Vs. Mudibasappa** which is reproduced herein:-

"9. We having noticed the facts of the case and the evidence on the record, we need to note the legal principles regarding nature of presumptions to be drawn under [Section 139](#) of the Act and the manner in which it can be rebutted by an accused. We need to look into the relevant judgments of this Court, where these aspects have been considered and elaborated.

10. Chapter XIII of the Act, 1881 contains a heading "Special Rules of Evidence". [Section 118](#) provides for presumptions as to negotiable instruments. [Section 118](#) is as follows:-

"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, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date —that every negotiable instrument bearing a date was made or drawn on such date;

11. Next provision, which needs to be noticed is [Section 139](#), which provides for presumption in favour of holder. [Section 139](#) lays down:-

"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."

13.. This Court in *Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal*, (1999) 3 SCC 35 had occasion to consider [Section 118\(a\)](#) of the Act. This Court held that once execution of the promissory note is admitted, the presumption under [Section 118\(a\)](#) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No.12 following has been laid down:-

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under [Section 118\(a\)](#) would arise that it

is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist....."

14. Justice S.B. Sinha in *M.S. Narayana Menon Alias Mani Vs. State of Kerala and Another*, (2006) 6 SCC 39 had considered [Sections 118\(a\), 138 and 139](#) of the Act, 1881. It was held that presumptions both under [Sections 118\(a\) and 139](#) are rebuttable in nature. Explaining the expressions "may presume" and "shall presume" referring to an earlier judgment, following was held in paragraph No.28:-

"28. What would be the effect of the expressions "may presume", 'shall presume' and "conclusive proof" has been considered by this Court in *Union of India v. Pramod Gupta*, (2005) 12 SCC 1, in the following terms: (SCC pp. 30-31, para 52)

"52...."It is true that the legislature used two different phraseologies 'shall be presumed' and 'may be presumed' in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words 'shall presume' would be conclusive. The meaning of the expressions 'may presume' and 'shall presume' have been explained in [Section 4](#) of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression 'shall presume' cannot be held to be synonymous with 'conclusive proof'."

15. It was noted that the expression "shall presume" cannot be held to be synonymous with conclusive proof. Referring to definition of words "proved" and "disproved" under [Section 3](#) of the Evidence Act, following was laid down in paragraph No.30:

"30. Applying the said definitions of "proved" or "disproved" to the principle behind [Section 118\(a\)](#) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

16. This Court held that what is needed is to raise a probable defence, for which it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and even the evidence adduced on behalf of the complainant can be relied upon. Dealing with standard of proof, following was observed in paragraph No.32:-

"32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

17. In *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde*, (2008) 4 SCC 54, this Court held that 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. Following was laid down in Paragraph No.32:-

"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 an accused and that of the prosecution in a criminal case is different."

18. This Court again reiterated that 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 an accused is "preponderance of probabilities". In paragraph No.34, following was laid down:-

"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 an 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."

19. In *Kumar Exports Vs. Sharma Carpets*, (2009) 2 SCC 513, this Court again examined as to when complainant discharges the burden to prove that instrument was executed and when the burden shall be shifted. In paragraph Nos. 18 to 20, following has been laid down:-

"18. Applying the definition of the word "proved" in [Section 3](#) of the Evidence Act to the provisions of [Sections 118](#) and [139](#) of the Act, it becomes evident that in a trial under [Section 138](#) of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of

presumptions under [Sections 118 and 139](#) of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in [Section 118](#) of the Act and use of the words "unless the contrary is proved" in [Section 139](#) of the Act read with definitions of "may presume" and "shall presume" as given in [Section 4](#) of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

20. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist....."

20. A Three-Judge Bench of this Court in *Rangappa Vs. Sri Mohan*, (2010) 11 SCC 441 had occasion to elaborately consider provisions of Sections 138 and 139. In the above case, trial court had acquitted the accused in a case relating to dishonour of cheque under [Section 138](#). The High Court had reversed the judgment of the trial court convicting the accused. In the above case, the accused had admitted signatures on the cheque. This Court held that where the fact of signature on the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however, this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. In Paragraph No.13, following has been laid down:-

"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."

21. After referring to various other judgments of this Court, this Court in that case held that the presumption mandated by [Section](#)

139 of the Act does indeed include the existence of a legally enforceable debt or liability, which, of course, is in the nature of a rebuttable presumption. In paragraph No.26, following was laid down:-

"26. In 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, (2008) 4 SCC 54 may not be correct. However, this does not in any way cast 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. Elaborating further, this Court held that [Section 139](#) of the Act is an example of a reverse onus and the test of proportionality should guide the construction and interpretation of reverse onus clauses on the defendant-accused and the defendant-accused cannot be expected to discharge an unduly high standard of proof. In paragraph Nos. 27 and 28, following was laid down:-

"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."

23. We may now notice judgment relied by the learned counsel for the complainant, i.e., judgment of this Court in Kishan Rao Vs. Shankargouda,. This Court in the above case has examined [Section 139](#) of the Act. In the above case, the only defence which was taken by the accused was that cheque was stolen by the appellant. The said defence was rejected by the trial court. In paragraph Nos. 21 to 23, following was laid down:-

"21. In the present case, the trial court as well as the appellate court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank, the presumption

under [Section 139](#) was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant, the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

22. Another judgment which needs to be looked into is [Rangappa v. Sri Mohan](#) (2010) 11 SCC 441. A three-Judge Bench of this Court had occasion to examine the presumption under [Section 139](#) of the 1881 Act. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paras 26 and 27:

"26. In 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 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.

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."

23. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High Court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under [Section 139](#) can be rebutted on the evidence of PW 1, himself has not been explained by the High Court.

24. The above case was a case where this Court did not find the defence raised by the accused probable. The only defence raised was that cheque was stolen having been rejected by the trial court and no contrary opinion having been expressed by the High Court, this Court reversed the judgment of the High Court restoring the conviction. The respondent cannot take any benefit of the said judgment, which was on its own facts.

25. We having noticed the ratio laid down by this Court in above cases on [Sections 118\(a\)](#) and [139](#), we now summarise the principles enumerated by this Court in following manner:-

25.1. Once the execution of cheque is admitted [Section 139](#) of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under [Section 139](#) is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. 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 they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence, [Section 139](#) imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence.

26. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under [Section 139](#) that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused. In cross-examination of the PW1, when the specific question was put that cheque was issued in relation to loan of Rs.25,000/- taken by the accused, the PW1 said that he does not remember. PW1 in his evidence admitted that he retired in 1997 on which date he received monetary benefit of Rs. 8 lakhs, which was encashed by the complainant. It was also brought in the evidence that in the year 2010, the complainant entered into a sale agreement for which he paid an amount of Rs.4,50,000/- to Balana Gouda towards sale consideration. Payment of Rs.4,50,000/- being admitted in the year 2010 and further payment of loan of Rs.50,000/- with regard to which complaint No.119 of 2012 was filed by the complainant, copy of which complaint was also filed as Ex.D2, there was burden on the complainant to prove his financial capacity. In the year 2010-2011, as per own case of the complainant, he made payment of Rs.18 lakhs. During his cross-examination, when financial capacity to pay Rs.6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts.

27. There was another evidence on the record, i.e., copy of plaint in O.S. No. 148 of 2011 filed by the complainant for recovery of loan of Rs. 7 lakhs given to one Balana Gouda in December, 2009. Thus, there was evidence on record to indicate that in December, 2009, he gave Rs.7 lakhs in sale agreement, in 2010, he made payment of Rs.4,50,000/- towards sale consideration and further he gave a loan of Rs.50,000/- for which complaint was filed in 2012 and further loan of Rs.6 lakhs in November,

2011. Thus, during the period from 2009 to November, 2011, amount of Rs.18 lakhs was given by the complainant to different persons including the accused, which put a heavy burden to prove the financial capacity when it was questioned on behalf of the accused, the accused being a retired employee of State Transport Corporation, who retired in 1997 and total retirement benefits, which were encashed were Rs.8 lakhs only. The High Court observed that though the complainant is retired employee, the accused did not even suggest that pension is the only means for survival of the complainant. Following observations were made in Paragraph 16 of the judgment of the High Court:-

"17. Though the complainant is retired employee, the accused did not even suggest that pension is the only means for survival of the complainant. Under these circumstances, the Trial Court's finding that the complainant failed to discharge his initial burden of proof of lending capacity is perverse."

28. There is one more aspect of the matter which also needs to be noticed. In the complaint filed by the complainant as well as in examination-in-chief the complainant has not mentioned as to on which date, the loan of Rs.6 lakhs was given to the accused. It was during cross-examination, he gave the date as November, 2011. Under [Section 118\(b\)](#), a presumption shall be made as to date that every negotiable instrument was made or drawn on such date. Admittedly, the cheque is dated 27.02.2012, there is not even a suggestion by the complainant that a post dated cheque was given to him in November, 2011 bearing dated 27.02.2012. Giving of a cheque on 27.02.2012, which was deposited on 01.03.2012 is not compatible with the case of the complainant when we read the complaint submitted by the complainant especially Para 1 of the complaint, which is extracted as below:-

"1. The accused is a very good friend of the complainant. The accused requested the Complainant a hand loan to meet out urgent and family necessary a sum of Rs.6,00,000/- (Rupees Six Lakh) and on account of long standing friendship and knowing the difficulties, which is being faced by the accused the complainant agreed to lend hand loan to meet out the financial difficulties of the accused and accordingly the Complainant lend hand loan Rs.6,00,000/- (Rupees Six Lakh) dated 27.02.2012 in favour of the Complainant stating that on its presentation it will be honored. But to the surprise of the Complainant on presentation of the same for collection through his Bank the Cheque was returned by the Bank with an endorsement "Funds Insufficient" on 01-03- 2012."

29. Thus, there is a contradiction in what was initially stated by the complainant in the complaint and in his examination-in-chief regarding date on which loan was given on one side and what was said in cross-examination in other side, which has not been satisfactorily explained. The High Court was unduly influenced by the fact that the accused did not reply the notice denying the execution of cheque or legal liability. Even before the trial court, appellant- accused has not denied his signature on the cheque.

30. We are of the view that when evidence was led before the Court to indicate that apart from loan of Rs.6 lakhs given to the accused, within 02 years, amount of Rs.18 lakhs have been given out by the complainant and his financial capacity being questioned, it was incumbent on the complainant to have explained his financial capacity. Court cannot insist on a person to lead negative evidence. The observation of the High Court that trial court's finding that the complainant failed to

prove his financial capacity of lending money is perverse cannot be supported. We fail to see that how the trial court's findings can be termed as perverse by the High Court when it was based on consideration of the evidence, which was led on behalf of the defence.

31. *This Court had occasion to consider the expression "perverse" in Gamini Bala Koteswara Rao and others Vs. State of Andhra Pradesh through Secretary, (2009) 10 SCC 636, this Court held that although High Court can reappraise the evidence and conclusions drawn by the trial court but judgment of acquittal can be interfered with only judgment is against the weight of evidence. In Paragraph No.14 following has been held:-*

"14. We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so."

32. *High Court without discarding the evidence, which was led by defence could not have held that finding of trial court regarding financial capacity of the complainant is perverse. We are, thus, satisfied that accused has raised a probable defence and the findings of the trial court that complainant failed to prove his financial capacity are based on evidence led by the defence. The observations of the High Court that findings of the trial court are perverse are unsustainable. We, thus, are of the view that judgment of the High Court is unsustainable.*

Learned counsel appearing for respondent No.1 in support of his argument also referred to **Paras-22 to 28** of the Hon'ble Apex Court Judgment reported in **(2013) 3 SCC 86** titled as **Vijay vs. Laxman and anr.**, which is reproduced here-in-under:-

"22. The decision in M.S. Narayana Menon (supra) was relied upon in [K. Prakashan v. P.K. Surenderan](#) where this Court reiterated the legal position as under:

"13. [The Act](#) raises two presumptions; firstly, in regard to the passing of consideration as contained in [Section 118 \(a\)](#) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in [Section 139](#) discharged in whole or in part any

debt or other liability. Presumptions both under [Sections 118 \(a\)](#) and 139 are rebuttable in nature.

14. *It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."*

23. *. To the same effect is the decision of this Court in [Krishna Janardhan Bhat v. Dattatraya G. Hegde](#) (2008) 4 SCC 54 where this Court observed:*

"32... Standard of proof on the part of an accused and that of the prosecution 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 an accused is preponderance of probabilities.*

45... *Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced."*

24. *Presumptions under [Sections 118\(a\)](#) and [Section 139](#) were held to be rebuttable on a preponderance of probabilities in [Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal](#) also where the Court observed:*

"11...'32... Though the evidential burden is initially placed on the defendant by virtue of S.118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden."

25. *In [Hiten P. Dalal v. Bratindranath Banerjee](#) (2001) 6 SCC 16 this Court compared evidentiary presumptions in favour of the prosecution with the presumption of innocence in the following terms:*

"22... Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. *In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person*

against whom the presumption is drawn from rebutting it and proving the contrary. ...”

26. *Decisions in Mahtab Singh & Anr. v. State of Uttar Pradesh 670, Subramaniam v. State of Tamil Nadu and Vishnu Dutt Sharma v. Daya Sapa* , take the same line of reasoning.

27. *Coming then to the present case, the absence of any details of the date on which the loan was advanced as also the absence of any documentary or other evidence to show that any such loan transaction had indeed taken place between the parties is a significant circumstance. So also the fact that the cheque was presented on the day following the altercation between the parties is a circumstance that cannot be brushed away. The version of the respondent that the cheque was not returned to him and the complainant presented the same to wreak vengeance against him is a circumstance that cannot be easily rejected. Super added to all this is the testimony of DW1, Jeevan Guru according to whom the accounts were settled between the father of the complainant and the accused in his presence and upon settlement the accused had demanded return of this cheque given in lieu of the advance. It was further stated by the witness that the complainant's father had avoided to return the cheque and promised to do so on some other day. There is no reason much less a cogent one suggested to us for rejecting the deposition of this witness who has testified that after the incident of altercation between the two parties the accused has been supplying milk to the witness as he is also in the same business. Non- examination of the father of the complainant who was said to be present outside the Court hall on the date the complainant's statement was recorded also assumes importance. It gives rise to an inference that the non- examination was a deliberate attempt of the prosecution to keep him away from the court for otherwise he would have to accept that the accused was actually supplying milk to him and that the accused was given the price of the milk in advance as per the trade practice in acknowledgement and by way of security for which amount the accused had issued a cheque in question.*

28. *In the totality of the above circumstances, the High Court was perfectly justified in its conclusion that the prosecution had failed to make out a case against the accused and in acquitting him of the charges. With these observations in elucidation of the conclusion drawn by my worthy colleague, I agree that the appeal fails and be dismissed.*

Stating thus, learned counsel appearing for respondent No.1 prayed to dismiss this appeal.

10. Heard both sides and perused the evidence on record.

11. It is evident from the record that both the complainant-appellant and respondent No.1 know each other and the series of business transactions as evident in the record cannot

be denied. The issuing of cheques and the cheque amount are not denied by the Court below.

12. It is seen from the record that in reply to the demand notice of the appellant dated 12th August 2019, respondent No.1 has given a reply dated 30.08.2019. After a categorical examination of the said reply to the demand notice of the appellant-complainant, it is apparent that respondent No.1 i.e., the accused-person herein in the said reply notice has not denied with regard to business relation transactions with the appellant-complainant and he has also not denied issuing of the cheques.

13. As per the evidence of the accused person, he has not denied the transactions, his issuing of cheques, and his signatures. So, in view of the same, this Court draws an inference that there was a business relation between the complainant and the accused person, and the cheques were paid to the accused person. Accordingly, reasonable presumption has to be made under Section 139 of N.I. Act. The amount of cheques which are issued are legally enforceable debt and thus the amounts are payable by the accused person to the complainant herein.

14. Since in the reply of the accused-respondent dated 30.08.2019 to the demand notice of the appellant-complainant dated 12.08.2019, he has not denied about the transactions, issuing of cheques, and putting his signature, accordingly, the

liability is confirmed. So because, there are transactions, issuing of cheques, and putting signatures, it amounts to legally enforceable debt and the same is recoverable. Hence this Court has no hesitation to draw a conclusion that, there is a legally enforceable debt and the cheque amount is to be paid. Further, the Judgments as cited by learned counsel appearing for respondent No.1 are not relevant to the facts of this case.

15. In view of the above discussion, this complaint filed under Section 138 of the Negotiable Instrument Act, 1881 stands allowed and accordingly, the present criminal appeal is allowed and closed with the following directions:-

a. The appellant-complainant is entitled to recovery of the cheque amount and the accused respondent No.1 herein is liable to pay the said cheque amount. Accordingly, it is directed that the accused-respondent No.1 shall pay the amount of Rs.20,00,000/- (Rupees twenty lakh) each in 2(two) cheques totaling Rs.40,00,000/- to the appellant-complainant herein.

B. The cheque amounts as mentioned here-in-above shall be paid by accused-respondent No.1 to the appellant-complainant within a period of 2(two) months from the date of this Judgment and Order. In the event if the cheque amounts are not paid within 2(two) months from the date of

Judgment and Order, the accused-respondent No.1 herein shall undergo Simple Imprisonment for a period of 1(one) year.

16. As a sequel, stay if any stands vacated. Pending application(s), if any also stands closed.

JUDGE

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