



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Revision Petition No. 273/2018

Shri Gopesh Debnath,
S/o Late Jogesh Debnath,
Resident of Saratpally, Sonai Road,
P.S.-Silchar, District-Cachar, Assam,
Pin-788005.

.....*Petitioner.*

-Versus-

1. Shri Manabendra Narayan Dhar,
S/o Late Manindra Narayan Dhar,
C/o Bishnupada Roy,
Near Srihatta Pally, National Highway,
PO & PS-Silchar, District-Cachar, Assam,
Pin-788005.
2. The State of Assam,
Represented by Public Prosecutor, Assam.

.....*Respondents.*

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

For the Petitioner : Mr. A. Das. Advocate.

For the Respondents : Mr. D. Chakraborty,
Mr. B. Sarma, Addl. P.P. Advocates.

Date of Hearing : 14.03.2024

Date of Judgment : 27.05.2024

JUDGMENT AND ORDER (CAV)

Heard Mr. A. Das, learned counsel for the petitioner; Mr. D. Chakraborty, learned counsel for the respondent No.1; and Mr. B. Sarma, learned Addl. P.P. for the State respondent No.2.

2. In the revision petition, under Sections 397/401 of the Cr.P.C. and Section 482 of the Cr.P.C. the petitioner, namely, Shri Gopesh Debnath, has challenged the legality, propriety and correctness of the Judgment and Order dated 27.04.2018, passed by the learned Additional Sessions Judge, Cachar, Silchar in Criminal Appeal No.45/2017. It is to be noted here that vide impugned Judgment and Order dated 27.04.2018, the learned Additional Sessions Judge, Cachar, Silchar had upheld the Judgment and Order dated 11.08.2017, passed in N.I. Case No.31/2010, by which the learned Additional Chief Judicial Magistrate, Cachar, Silchar had convicted the petitioner under Section 138 of the Negotiable Instruments Act, 1881, and sentenced him to suffer simple imprisonment for one year and also to pay the

Cheque amount i.e. Rs. 5,00,000/- (Rupees Five Lakhs) along with an amount of Rs. 2,00,000/- (Rupees Two Lakhs) as compensation, total Rs. 7,00,000/- (Rupees Seven Lakhs) only to the complainant/respondent No.1, in default to undergo further simple imprisonment for four months.

3. The background facts, leading to filing of the present petition are briefly stated as under:-

“The petitioner was a contractor and known to the respondent No.1/complainant. The petitioner took loans from the respondent No.1/complainant from time to time, for the purpose of execution of his contract work, with a promise to pay the same on demand. Thereafter, the petitioner in discharge of his liability, had issued a Cheque, bearing No.254228, dated 12.09.2009, on 12.09.2009, drawn on his savings Bank Account No. 9008918, maintained with UCO Bank, Silchar Branch for Rs. 5,00,000/- (Rupees Five Lakhs) only in favour of the respondent No.1/complainant on the demand of the respondent No.1/complainant. Then the respondent No.1 had presented the said cheque with his banker. But, the same returned unpaid with the endorsement- ‘insufficient fund’, vide cheque returning Memo, dated 04.03.2010. The respondent No.1 then issued a legal notice to the petitioner, demanding the cheque amount vide Notice, dated 30.03.2010, within 15 (fifteen) days. But, the petitioner had failed to pay the said amount to the respondent No.1 even after receipt of the said notice on 06.04.2010.

Then the respondent No.1/complainant had filed a Complainant Case, being N.I. Case No.31/2010, against the present petitioner, under Section 138 of the NI Act, 1881 in the court of the Learned Chief Judicial Magistrate, Cachar, Silchar. The petitioner on receipt of summon had appeared before the learned trial Court and then the learned trial court had explained the particulars of offence under Section 138 of the N.I. Act, to which the petitioner had pleaded not guilty and claimed to be tried.

During the course of trial, the respondent No.1/complainant had adduced as many as five witnesses in support of his case. After closing the evidence of the respondent No.1, the learned trial court had examined the petitioner under section 313 of the Cr.P.C. The petitioner had also adduced one witness in support of his defence.

Then hearing arguments of both sides and considering the materials available on record, the learned Additional Chief Judicial Magistrate, Cachar, Silchar, vide its Judgment and Order, dated 11.08.2017, had convicted the petitioner for the offence under Section 138 of the NI Act, 1881, and sentenced him as aforesaid.

Then being aggrieved and dissatisfied with the impugned Judgment and Order dated 11.08.2010, passed in N.I. Case No.31/2010, by the court of the learned Additional Chief Judicial Magistrate, Cachar, Silchar, the petitioner had preferred an appeal under Section 374(3) of the Cr.P.C., 1908 before the court of the Learned Sessions Judge, Cachar, Silchar, upon which

Criminal Appeal No.45/2017 was registered. The Learned Sessions Judge, Cachar, Silchar, then transferred the said Criminal Appeal No.45/2017, to the Court of the learned Additional Sessions Judge, Silchar, Cachar for disposal.

Then hearing learned Advocates of the respective parties in the said Criminal Appeal No.45/2017, the learned Additional Sessions Judge, Silchar, Cachar had dismissed the said criminal appeal, vide its impugned Judgment and Order dated 27.04.2018, and upheld the judgment and order dated 11.08.2017, passed by the learned Trial Court in connection with N.I. Case No.31/2010."

4. Being highly aggrieved and dissatisfied, the petitioner has approached this Court for setting aside the impugned judgments and orders on the following grounds:-

- (i) That, the impugned Judgment and Order dated 27.04.2018, so passed by the court of the Learned Additional Sessions Judge, Silchar, Cachar in Criminal Appeal No.45/2017, is not sustainable on facts and in law;
- (ii) That, the impugned judgment and order was passed in a most perfunctory and mechanical manner and without judicious application of mind;
- (iii) That, both the learned courts below have failed to consider that the respondent No.1 had absolutely failed to establish his case beyond all reasonable doubt;

- (iv) That, the learned courts below had not scrutinized the evidence so adduced by the witnesses in proper perspective and the impugned judgments and orders are based on inferences and presumption;
- (v) That, the evidence relied upon by the complainant/respondent No.1 had not conclusively proved that the petitioner is the perpetrator of the alleged crime;
- (vi) For that the pleader's Notice dated 30.03.2010 i.e., Ext.4 sent by the complainant/respondent No.1 addressing the same to the petitioner was not duly served on the petitioner as it appears from the Ext.5 i.e., the Acknowledgement Card that it was received by one Supriti Debnath, but the complainant/respondent No.1 had failed to establish any relationship between the petitioner and said Supriti Debnath, but the learned courts have failed to take note of the same;
- (vii) That, the learned courts below failed to appreciate that the complainant/respondent No.1 had failed to establish that there was cash transaction between the complainant and the petitioner. Moreover, the complainant/respondent No.1 in his deposition has not stated anything about the date and time of the alleged transactions and had failed to prove the existence of any lawful debt and in absence of any existing lawful debt the petitioner ought not to have been held guilty for an offence under Section 138 of the N.I. Act;

- (viii) That, there was contradiction in the evidence of P.W.2 but the same was not considered by the learned courts below;
- (ix) That, the learned courts below had failed to appreciate the contradictory evidence of P.W.3 i.e., Sadhanya Choudhury and of P.W.4 Sri Pradip Paul, the Senior Manager, UCO Bank, Silchar Branch and the D.W.1 i.e., Sri Mohan Lal Goswami, the Senior Manager of UCO Bank, Silchar Branch in its proper perspective;
- (xii) That, the learned courts below had decided the case purely on the basis of assumption and presumption by overlooking material evidence available on records;
- (xiii) That, the observation made by the learned trial court in its judgment, while evaluating the depositions of P.W.2 and P.W.3 had mentioned that **"the accused had taken an amount of Rs. 5 Lakhs as loan from the Complainant in his presence"** but no such deposition is available in the examination-in-chief given on Affidavit by both the P.W.2 and P.W.3, which indicates non-application of judicial mind which resulted in miscarriage of justice;
- (xiv) That, the learned courts below while adjudicating the case have failed to consider the fact that the petitioner had already stopped the payment of the said cheque in question by a Letter dated 24.02.2010, addressed to the Bank and the bank authority in this regard had adduced evidence before the learned courts below but, the learned courts below had failed to appreciate the evidence of the Bank Manager in its proper perspective;

- (xv) That, there is no iota of evidence to justify the commission of the alleged offence by the petitioner and there are no independent witnesses;
- (xvi) That, both the learned courts below had failed to appreciate that the books of account or statement of account of the respondent No.1 in respect of the aforesaid alleged transaction, has not been filed or exhibited by the complainant/respondent No.1; and
- (xvii) That, the learned courts below had also failed to invoke its jurisdiction under Section 311 of the Cr.P.C. to summon material witnesses.

5. Mr. A. Das, the learned counsel for the petitioner, during hearing, has contended to allow the petition, canvassing the following points for consideration of this court:-

- (i) The respondent/complainant No.1 had failed to establish by adducing evidence that the loan amount was Rs. 9,00,000/-. There is no whisper either in the complaint or in the affidavit and the income tax return, submitted by the respondent speaks otherwise;
- (ii) That, service of notice upon the petitioner has not been proved and as per A/D Card, the notice was received by one Supriti Debnath, but there is no material to establish the relation between the petitioner and Supriti Debnath;

- (iii) The respondent No.1/complainant had failed to establish any legally enforceable liability of the petitioner;
- (iv) The respondent No.1/complainant had failed to establish the source of income though he had reflected the amount in his income tax return; and
- (v) The learned trial court had failed to invoke the jurisdiction under Section 311 of the Cr.P.C. so as to examine the petitioner as well as that of Pankaj Sardha and Ranjit Debnath on its own motion for the purpose of arriving at the truth of the case.

5.1. Mr. Das has also referred following case laws in support of his submission:-

- (i) **Krishna Janardhan Bhat vs. Dattatrya G. Hegde**, reported in **(2008) 4 SCC 54**;
- (ii) **Rangappa vs. Sri Mohan**, reported in **(2010) 11 SCC 441**;
- (iii) **Jose Pullen @ Joseph P vs. Uma Jasrasaria @ Agarwal Properitor of Kojani's Dhankheti**, reported in **2011 (4) GauLR 9**;
- (vi) **ANSS Rajshekhar vs. Augustus Jeba Ananth**, reported in **(2020) 15 SCC 348**;
- (vii) **S. Murugan vs. M.K. Karunagaram**, reported in **SLP (CrI) No. 7618/2023**;
- (viii) **M.D. Thomas vs. P.S. Jaleel & Anr.**, reported in **(2009) 14 SCC 398**; and

(ix) **Idder & Ors vs. Aabida & Anr.**, reported in
(2007) 0 AIR (SC) 3029.

6. Whereas, Mr. D. Chakraborty, the learned counsel for the respondent No.1 submits that there is concurrent finding of the learned trial court and of the learned first appellate court and unless there is gross illegality shown to have committed by the learned courts, the impugned judgments and orders may not be interfered with by this Court. Mr. Chakraborty, the learned counsel for the respondent No.1, submits that notice had duly been served upon the petitioner.

7. Mr. D. Chakraborty further submits that the petitioner had not disputed the cheque in question and the signature thereon and as such, presumption under Sections 118 and 139 of the N.I. Act is available and the learned courts below had rightly drawn presumption in favour of the holder of the cheque i.e. the respondent No.1/complainant. Mr. Chakraborty further submits that at first the petitioner had admitted receipt of notice, though subsequently, he had denied in his statement under Section 313 of the Cr.P.C. about receipt of notice. Moreover, Mr. Chakraborty submits that the petitioner had adduced no evidence in defence to support his contention that Smt. Supriti Debnath, who received the notice, is not related to him. The notice was sent in the same address as mentioned in the complaint and there is no cross-examination on that point. Mr. Chakraborty further submits that the factum of taking a loan by the petitioner from the respondent No.1 remains un-rebutted in his cross-examination and

the same has been shown in the return of income tax and there is no cross-examination on that point. Mr. Chakraborty further submits that since the petitioner has admitted his signature in the cheque in question, the learned court below, had rightly drawn presumption under Sections 118 and 138 of the N.I. Act and the finding so recorded by the learned courts below are also supported by numbers of decision of Hon'ble Apex Court and as such, no interference of this Court is warranted in the same and therefore, it is contended to dismiss the petition. Mr. Chakraborty has also referred to a decision of the Hon'ble Supreme Court in the case of **Rajesh Jain vs. Ajay Singh**, reported in **(2023) 10 SCC 148**.

8. Having heard the submission of learned Advocates of both the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the impugned judgments and orders passed by the learned trial court as well as by the learned first appellate court.

9. It is to be noted here that the learned trial court in the impugned judgment and order had identified following points for determination :-

- (i) Whether the accused person, in order to discharge his liability in whole or in part, had issued the cheque bearing No.254228, dated 12.09.2009, drawn on UCO Bank, Silchar Branch, Cachar, for an amount of Rs. 5,00,000/- to the complainant?

- (ii) Whether the said cheque No.254228 issued by the accused to the complainant was dishonored by the Assam Gramin Vikash Bank, Cachar, Silchar Branch, which is the banker of the complainant, due to insufficiency of fund after it was deposited within its validity?
- (iii) Whether the complainant had sent demand notice to the accused within 30 days on receipt of the information that the cheque issued by him had been dishonored due to insufficiency of fund for the amount of Rs. 5,00,000/- in total?
- (iv) Whether the accused failed to pay back the amount within 15 days of receipt of the demand notice?
- (v) Whether the accused is liable to be punished under Section 138 of the N.I. Act and any other reliefs that the complainant is entitled to?

10. Thereafter, considering the evidence so adduced before it and also hearing arguments of learned Advocates of both the parties, the learned trial court had decided all the aforesaid points in favour of the respondent No.1 and thereafter, found the case against the petitioner well established under Section 138 of the N.I. Act and thereafter convicted and sentenced him accordingly.

11. While dealing with the Point No.(i), the learned trial court had found that the accused/petitioner had issued cheque No.254228, dated 12.09.2009, drawn on UCO Bank, Silchar Branch, Cachar, for an amount of Rs. 5,00,000/- to the complainant/respondent No.1 in

discharge of his liability. The learned court below had also drawn presumption in favour of the holder of the cheque in due course, in view of the provision of Sections 118 and 139 of the N.I. Act.

12. The learned trial Court had relied upon two decisions of Hon'ble Supreme Court in the case of **K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr.**, reported in **1999 SCC (Cri) 1284** and in **Rangappa vs. Sri Mohan**, reported in **(2010) 11 SCC 441**. Besides, the learned trial court had also relied upon two decisions of Gauhati High Court in **Ambika Prasad Baishya vs. State of Assam & Anr.**, reported in **2009 (6) GLR 726** and in **Indrani Talukdar vs. State of Assam & Anr.**, reported in **2013 (3) GLR 115**.

13. It is to be noted here that Section 118 of the N.I. Act lays down that until the contrary is proved, it shall be presumed that every Negotiable Instrument was made or drawn for consideration. Section 139 of the N.I. Act contemplated that unless the contrary is proved, it shall be presumed that the holder of the cheque received the cheque of the nature referred to in Section 138 of the N.I. Act for the discharge, in whole or part of any debt or liability. In catena of decisions, it has been repeatedly observed by Hon'ble Supreme Court that in the proceeding under Section 138 of N.I. Act, the complainant is not required to establish either the legality or the enforceability of the debt or liability, since he can avail the benefit of presumption under Sections 118 and 139 of the N.I. Act in his favour. Further, it was observed that by virtue of the presumptions, the accused had to

establish that the cheque in question was not issued towards any legally enforceable debt or liability.

14. In the case of **Rangappa** (supra), a three-Judges Bench of Hon'ble Supreme Court has held that Section 139 of the N.I. Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the N.I. Act is rebuttable. Terming this as an example of a "reverse onus clause" the court held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the N.I. Act is guided by preponderance of probabilities.

15. It is further held that:-

"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."

16. Again in the case of **Bir Singh vs. Mukesh Kumar**, reported in **Criminal Appeal Nos. 230-231 of 2019 [@SLP (CRL) Nos. 9334-9335 of 2018]** Hon'ble Supreme Court has held that :-

"38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

.....
.....

"42. In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant-complainant, it may reasonably be presumed that the cheque was filled in by the appellant-complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent-accused of the charge under Section 138 of the Negotiable Instruments Act."

17. In the case of **M.S. Narayan Menon vs. State of Kerala, (2006 SAR CrI. 616)**, Hon'ble Supreme Court has held that the

presumption available under Sections 118 and 139 of N.I. Act can be rebutted by raising a probable defence and the onus cast upon the accused is not as heavy as that of the prosecution. Further, in the case of **Krishna Janarshana Bhat vs. Dattatreya G. Hegde**, reported in **(2008 Vol.II SCC Crl.166)**, Hon'ble Supreme Court has held that the existence of legally recoverable debt was not a presumption under Section 138 of the N.I. Act and the accused has a constitutional right to maintain silence and therefore, the doctrine of reverse burden introduced by Section 139 of the N.I. Act should be delicately balanced. In conclusion, it has been observed that the presumption mandated by Section 139 of the N.I. Act does indeed include the existence of legally enforceable debt or liability; it is a rebuttable presumption, open to the accused to raise defence wherein the existence of the legally enforceable debt or liability can be contested. If the accused is able to raise a probable defence, which creates doubt about the existence of legally enforceable debt or liability, the onus shifts back to the complainant. Same proposition of law is echoed in the case of **Rajesh Jain** (supra) referred by Mr. Chakraborty, learned counsel for the respondent No.1/claimant and also in the case of **ANSS Rajshekar** (supra) referred by Mr. A. Das, learned counsel for the petitioner, wherein the ratio of **Rangappa** (supra) has also been discussed.

18. Though, referring to a decision of Hon'ble Supreme Court in **Krishna Janardhan Bhat vs. Dattatraya G. Hegde**, reported in **(2008) 4 SCC 54**, Mr. Das, learned counsel for the petitioner submits that existence of a legally enforceable debt is not a matter of

presumption under Section 139 of the N.I. Act, but, the learned trial court had presumed existence of a legally recoverable debt, yet having examined the finding of the learned trial court in the light of the facts and circumstances on the record, I find that no contrary view has been taken by the learned court below. It is to be noted here that Hon'ble Supreme Court, in the said case has held as under:-

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

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

19. It also appears from the record of the learned trial court and also from the submission of Mr. Das, the learned counsel for the petitioner that the petitioner had taken a plea that he had lost the cheque and thereafter, he had asked his banker to stop payment and to that effect he had examined the Senior Manager of UCO Bank, Cachar, Silchar, who had confirmed receiving instruction from the

petitioner on 24.02.2010 for stop payment of cheque No. 254228 on account of the fact that he had lost the same. Thereafter, the bank received the cheque No. 254228, for a sum of Rs. 5,00,000/- from Assam Gramin Bikash Bank for clearance on 24.03.2010. According to D.W.1 when the cheque amount is Rs. 5,00,000/- or more and then the reason would have been stop payment but when the amount is less than Rs. 5,00,000/- the system shows the reason as insufficiency of fund. But, D.W.1 had failed to produce the stop payment instruction letter in the court being the same old one and could not be traced out and this non-production of instruction letter makes his evidence unreliable and the plea of the petitioner, thus remained unsubstantiated. Besides, the evidence of D.W.1, as well as Exhibit B4, the system generated statement, also indicates that the balance in the account of the petitioner was Rs.4112/-.

20. Admittedly, the petitioner had not lodged any information to Police about losing of his cheque. Such a plea was also not taken in his statement under Section 313 of the Cr.P.C. He had also not adduced any evidence in support of claim of the cheque being lost. On these counts a reasonable doubt arises about the veracity of the claim of the petitioner and as such the learned trial court and also the learned first appellate court had rightly disbelieved the version of the petitioner. The learned first appellate court also observed that the petitioner did not adduce sufficient evidence to prove about the cheque being lost by him. The cheque was dated 12.09.2009 and the petitioner had informed his banker to stop payment only on 24.02.2010 and that there was no averment from where and when the

cheque was lost and even a suggestion was also not put to the respondent that the name and other figures in the cheque was not of his hand writing and that he also failed to give any explanation as to why he took five months to intimate the Bank and also he could not explain as to why he put his signature over the Cheque and on such count the plea of the petitioner is not sustainable. The learned first appellate court also relied upon the decision of **K. Bhaskaran** (supra) and held that the learned trial court had rightly drawn the presumption under Section 139 of the N.I. Act. It is to be noted here that in the case of **K. Bhakaran** (supra), the Hon'ble Supreme Court has held that:-

"9. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The trial court was not persuaded to rely on the interested testimony of DW 1 to rebut the presumption. The said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect."

21. Thus, I find that the findings, so recorded by the learned courts below, in respect of the statutory presumption, suffers from no illegality or infirmity requiring any interference of this Court. Though Mr. Das, the learned counsel for the petitioner, referring to a decision of Hon'ble Supreme Court in **ANSS Rajsekhar** (supra) and submits

that the respondent had failed to establish the source of income, yet, having gone through the record of the learned court below I find that respondent had duly reflected the amount of Rs. 5,00,000/- in his income tax return. However, he had not made any whisper either in the complaint or in his evidence regarding the source of his income. But, the income tax return and the contents thereof were not disputed by the petitioner. Even he did not put a single question to the respondent regarding his source of fund. For the first time he raised the issue before this court. As all the materials necessary to decide the issue, was not already before this court, and as the issue, so raised requires the trial court to find out facts in coming to the conclusion involves the question of facts, this court is of the opinion that such issue is not permissible at this stage.

22. It also appears that the learned trial court, while disbelieved the version of the petitioner, in respect of the cheque being lost, had relied upon a decision of Hon'ble Supreme Court in the case of **M/s. M.M.T.C. Ltd. & Anr. vs. M/s. Medchl Chemicals & Pharma (P) Ltd. & Anr.**, reported in **(2002) 1 SCC 234**, wherein it has been held that-

".....The authority shows that even when the cheque is dishonoured by reason of stop payment instruction, by virtue of Section 139, the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the 'stop payment' instructions were not issued because of

insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused”.

23. Here in this case, the petitioner has failed to establish that there was sufficient fund in his account so as to honour the cheque. That being so, the presumption, as held in the case of **Medchl Chemicals & Pharma (P) Ltd.** (supra) is available in favour of the respondent. It is to be noted here that the evidence of the respondent (P.W.1) and the Exhibit-2, cheque returning memo, and also the evidence of the witness of the petitioner (D.W.1) clearly and unequivocally indicates insufficiency of fund in the account of the petitioner.

24. In the instant case, the petitioner had not disputed the cheque in question and his signature thereon and as such, the statutory presumption under Sections 118 and 139 of the N.I. Act is very much available in all its plenitude and amplitude. The petitioner had failed to rebut such a presumption. Neither he appeared in the witness box to adduce evidence to rebut the statutory presumption, nor could he show any material available on the record, to rebut the presumption. That being so, no fault can be found with the finding of the learned

trial court as well in the finding of the learned first appellate court in this regard. Thus, it appears that the learned trial court as well as the first appellate court both had rightly drawn such presumption in favour of the holder of the cheque i.e. the respondent No.1.

25. That, as regard the contention of Mr. Das that service of legal notice upon the petitioner has not been proved; it appears from the A/D Card that the same was received by one Supriti Debnath and the relation between the petitioner and said Supriti Debnath is not clear from the same. It also appears that the said issue was raised before the learned trial court also and the learned trial court, having relied upon a decision of Hon'ble Supreme Court in the case of **C.C. Alavi Haji vs. Palapetty Muhammed & Anr.**, reported in **(2007) 3 SCC(Cri) 236**, had presumed that Supriti Debnath is the family member of the petitioner. The learned trial court also found that the petitioner had not even suggested during cross-examination of the respondent that Supriti Debnath was not related to him or that she was not his immediate family member. The learned trial court also found that the notice was issued well within time and was properly addressed.

26. It is to be noted here that in the case of **C.C. Alavi Haji** (supra) a three Judge Bench of Hon'ble Supreme Court has held as under:-

"10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the

drawer of the cheque, the principle incorporated in Section 27 of the GC Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.

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15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the court to draw presumption or inference either under Section 27 of the GC Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the court is required to be prima facie satisfied that a case under the said section is made out and the afore noted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our

opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.”

27. In the case of **K. Bhaskaran** (supra) Hon’ble Supreme Court has held as under:-

“24. No doubt Section 138 of the Act does not require that the notice should be given only by “post”. Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.”

28. Mr. Das, learned counsel for the petitioner, however, referring to a decision of Hon’ble Supreme Court in **M.D. Thomas** (supra), submits that as the respondent has failed to establish the relation between Supriti Debnath and of the petitioner, and as such it cannot be said that the respondent had complied with the requirement of giving notice in terms of Clause (b) of proviso to Section 138 of the N.I. Act. It is to be noted here that in the said case notice was served upon wife of the appellant. As such, there is substance in the submission of Mr. Das.

29. But, the decision of **M.D. Thomas** (supra) is later in point of time and the strength of the bench is of two Judges. Whereas, the decision of **C.C. Alavi Haji** (supra) is earlier in point of time and the strength of the bench was of three Judges. That being so, not fault can be found with the finding of the learned trial court, when it had placed reliance upon the decision of **C.C. Alavi Haji** (supra) and drawn presumption of service of notice under Clause (b) of Section 138 of the N.I. Act, as the legal notice, Exhibit-4, was sent well within time, in the proper address of the petitioner. The learned first appellate court also found that presumption of service of notice is available and recorded agreement with the finding of the learned trial court. It is worth mentioning in this context that the petitioner in his examination under Section 313 Cr.P.C. in his answer to the question No.1, in no uncertain terms admitted that **"he received the notice from the complainant"**, though subsequently he had denied the same.

30. That, as regard the submission of Mr. Das that the learned trial court had failed to invoke the jurisdiction under Section 311 Cr.P.C., so as to examine the petitioner as well as that of Pankaj Sardha and Ranjit Debnath on its own motion for the purpose of arriving at the truth of the case; this Court finds no merit in the same as it was the primary duty of the petitioner to rebut the statutory presumption available under Sections 118 and 139 of the N.I. Act in favour of the respondent. If the petitioner chooses not to appear in the witness box and to adduce evidence to discharge the reverse burden and also fails

to make any endeavor to show any materials from the record in that regard, then suo motto invoking of the discretionary jurisdiction under section 311 Cr.P.C. by the courts is neither advisable nor permissible under the law. There is nothing on the record to show that the petitioner had ever filed any petition before the learned trial court or made any verbal prayer to that effect.

31. In the case of **Swapan Kumar Chatterjee vs. CBI**, reported in **(2019) 14 SCC 328**, it has been held by the Hon'ble Supreme Court that – "It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

32. It is to be noted here that the aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

33. In the case in hand, no such valid and strong reason is shown by the learned counsel for the petitioner. That being so, the submission of Mr. Das, in respect of suo motto exercise of such discretionary power and blaming the court is found to be devoid of substance and accordingly, the same stands repudiated. I have gone through the decision in **Iddar and Another** (supra) and I find that there is no quarrel in respect of the proposition of law so laid down in the said case. But, in view of the discussion so made herein above, this court is of the view that the ratio laid down therein would not advance the case of the petitioner. It is to be noted here that in the said case Hon'ble Supreme Court has held as under:-

“.....There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.”

34. That being so, the findings, so recorded by the learned trial court as well as learned first appellate court in the impugned judgments and order, in the light of given facts and circumstances on the record and also in the light of principle enunciated by the Hon'ble Supreme Court in the cases discussed herein above, this Court is of the opinion that no impropriety or illegality is committed by the learned trial court as well as the learned first appellate court in deciding the complaint case, being N.I. Case No.31/2010 and the Criminal Appeal No.45/2017.

35. Thus, having carefully considered the submission of Mr. Das, the learned counsel for the petitioner and also having gone through the case laws referred by him, I find his submission devoid of merit and also I find that the ratios, laid down in the cases referred by him would not advance the case of the petitioner. No doubt some contradictions are here and there but the same appears to be not on material point so as to spell inveracity to the case of the respondent No.1. On the other hand, I find sufficient force in the submission of Mr. Chakravarty, the learned counsel for the respondent and the ratio laid down in the case of **Rajesh Jain** (supra) referred by him also strengthened his submission and therefore, this Court is inclined to record concurrence to the same.

36. In the result, I find this revision petition devoid of merit and accordingly, the same stands dismissed. The registry shall send down the record of the learned courts below with a copy of this judgment and order. The parties have to bear their own cost.

JUDGE

Comparing Assistant