

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

Reserved on: 03.09.2015

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Date of Decision: 15.09.2015

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CRL.REV.P. 188/2015

WILSON MATHEW

..... Petitioner

Through: Mr.Santosh Kumar, Advocate.

versus

THE STATE NCT OF DELHI & ANR.

..... Respondents

Through: Mr.Raghuvinder Varma, APP.
Mr.Santosh Kumar Pandey,
Mr.Tungesh, Advocates for the
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J:

1. Wilson Mathew stood convicted under Section 138 of the Negotiable Instruments Act, 1881 (for short 'NI Act') by judgment dated 02.06.2014 passed by the learned Metropolitan Magistrate (South)-01, NI Act, South Courts, New Delhi, in CC No.958/1. By order dated 24.06.2014 passed by the Trial Court, the petitioner was sentenced to 4 months Simple Imprisonment and was directed to pay a compensation of Rs.3,08,100/-; Rs.2,05,400/-; Rs. 2,56,750/-; Rs.1,54,050/- respectively against the cheques in question along with interest of 9% p.a. within one

month to the complainant (respondent no.2). It was stipulated that in default, the petitioner would further suffer sentence of Simple Imprisonment of 3 months.

2. There were four connected cases bearing CC No.958/1, 959/1, 960/1 and 961/1 under the same name and title namely Sanjeev Kumar vs. Wilson Mathew. In each of the cases, similar sentence of imprisonment has been awarded but with a direction that all the sentences shall run concurrently.

3. The petitioner preferred four appeals namely Criminal Appeal Nos.82/2014, 83/2014, 84/2014 and 85/2014 before the learned Additional Sessions Judge-03, Patiala House Courts, New Delhi, all of which were disposed of by a common order dated 29.01.2015.

4. In the aforesaid appeals, the conviction of the petitioner was sustained but the sentence was modified and instead of sentence of four months Simple Imprisonment, the petitioner was directed to pay the compensation amount (Rs.3,08,100/-; Rs. 2,05,400/-; Rs.2,56,750/- and Rs. 1,54,050/-) in each of the complaint case respectively against 11 cheques along with interest of 11% p.a. within two months, to the complainant, and in default of payment of compensation, the petitioner was directed to suffer imprisonment for 3 months.

5. The petitioner has challenged the aforementioned judgments and orders of both the courts below.

6. It has been submitted on behalf of the revisionist/petitioner that both the judgments are not based on proper appreciation of evidence on record. Despite the categorical admission of the complainant that the cheques were accepted by him for security purposes and that they were received by him in the year 2007 at the time of handing over of money to the petitioner, the petitioner has been convicted. It has further been argued that if the cheques had been issued towards repayment of loan, it should have been dated for the year 2008-09 and not January 2011; for the loan was only for two years. The courts below, it has been argued, did not take into account the fact that a composition agreement was arrived at between the parties in the Trial Court in which there was an admission of the respondent of having received Rs.8.80 lacs. from the petitioner. Both the courts did not take into account this aspect of composition on the slender ground that neither the composition agreement was brought on record nor any witness was examined in that regard. The further case of the petitioner is that the exorbitant rate of interest (24% p.a.) on which the complainant (respondent no.2) obtained loan for the purposes of re-lending to the petitioner does not seem to be probable and which ground is further buttressed by the fact that the amount of loan is neither reflected in the ITR of the complainant nor of the two persons namely CW-2 and CW-3 from whom the complainant (respondent no.2) obtained money. It has lastly been argued that the petitioner has already paid Rs.8.80 lacs. to the respondent no.2 against the loan amount of Rs.8 lacs.

7. Rebutting such arguments, learned counsel for the respondent submitted that the grounds taken in the present petition by the petitioner were neither raised before the Trial Court nor before the Appellate Court and that in revisional jurisdiction, the courts do not normally interfere with the concurrent findings of conviction.

8. It is argued that a cheque issued even by way of security would be covered under Section 138 of the NI Act. The onus to raise the probable defence lies only with the accused as the law casts a presumption in favour of the holder of the cheque that the dishonoured cheque was issued in respect of the debt or other liability. The aforesaid onus obliges the accused to raise a defence either by finding holes in the case of the prosecution or by leading defence evidence which can lead the court to believe that there is a probable defence of the accused against the claim of the complainant with regard to the existence of legally enforceable debt or other liability. Even though, the said onus does not impose as stringent an obligation on the accused, as it does on the complainant who is to prove his case beyond all reasonable doubts but raising no defence at all would definitely not absolve the accused and it would not be in his mouth to say that the presumption under Section 139 of the NI Act has been rebutted.

9. In order to appreciate the contention of the parties, it is necessary to examine the complaint of the respondent.

10. Four complaints were filed by the respondent no.2 stating interalia that in the year 2006-07, the respondent was in employment of the petitioner when there was a demand of money by the petitioner for the purposes of expanding his business. The petitioner wanted the complainant to arrange for Rs.10 lacs. in all.

11. That finding himself incapable of giving such huge amount as loan, the complainant agreed to introduce the accused to other persons who could lend money to him. The aforesaid persons who were introduced to the petitioner, agreed to lend money to the complainant who could in turn give the same to the petitioner. The petitioner was ready and desirous of taking loan and therefore agreed to return such loan, if given, with interest as agreed upon by the friends of the complainant who had given money to the complainant. Believing such assurance of the petitioner, the complainant borrowed an amount of Rs.7 lacs. from his friends on interest @ of 24% p.a. The aforesaid money was given to the accused in successive installments i.e. Rs.3 lacs. in the first instance and Rs.2 lacs. each in second and third instances, but all during the period 2006-07. There was again a demand of the petitioner of a further loan of Rs.4 lacs.. However, against such a demand, Rs.3 lacs. was paid by the complainant from his own funds and resources in the year 2007. The accused agreed to pay interest @ 24% p.a. on the amount which was last paid by the complainant from his own resources. The entire loan amount was given to the accused for a period of 2 years

and the accused had promised to pay the same within fixed time along with stipulated interest.

12. On failure of the petitioner to repay the loan amount along with interest, a legal notice dated 13.12.2010 was served upon him. Responding to such notice, it is alleged, and in discharge of admitted legal liability, the accused petitioner issued two cheques in favour of the complainant for a sum of Rs.3 lacs. with an assurance that the said cheques would be honoured/encashed on its presentation. On presentation of such cheques, they were returned unpaid with the remark of 'funds insufficient'. A legal notice under Section 138 of the NI Act dated 17.01.2011 was dispatched to the accused and he was asked to make payment of dishonoured cheques within a period of 15 days from the date of the receipt of the notice. No money was paid despite such notice. Hence, the complaint.

13. During trial, the complainant examined himself as CW-1 and offered Satbir Singh, his cousin and Tej Raj, his associate, as CW-2 & CW-3 respectively before the Trial Court.

14. The complainant (respondent no.2) in his cross examination has stated that he is a property dealer and earns from the rental income of his property as well. In the year 2006, he worked in Capital Network Pvt. Ltd as supervisor and was paid a salary of Rs. 8,000/- pm. He is an Income Tax assessee. However, he has stated that he does not remember the date

and month when he gave money to the accused. He only remembered of having given Rs. 10 lacs. in all to the accused, spaced over a period of one year. No receipt was admittedly taken by the complainant from the petitioner.

15. The complainant has admitted in his cross examination that he took cheques from the accused for the security purpose and that the cheques were received by him in the year 2007, at the time of handing over money to the accused. However, the particulars in the cheques were filled up in the handwriting of the accused. Contradictory statements, thus, were made by the complainant during his cross-examination. In the first part of the cross-examination, the complainant has stated that it is wrong to suggest that he gave Rs. 10 lacs. to the accused. In the later part of the cross-examination, the complainant has admitted of the accused having taken an amount of Rs. 8 lacs. from him but denied the suggestion that for such Rs. 8 lacs., he was paid and he received Rs. 8.80 lacs. from the accused.

16. Satbir Singh, a cousin of the complainant, has testified to the fact that complaintant told him that the accused was in need of money. He arranged for Rs. 3 lacs., which money was paid to the accused in the month of November-December, 2007. He has admitted of not having shown such loan in his income tax return, even though he had a business of transport.

17. Tej Raj, CW-3, a property dealer and friend of the complainant also admits of having given Rs. 3 lacs., to the complainant with an assurance from him that the money would be returned within 6 months. The aforesaid CW-3 has deposed that he disclosed about loan of Rs. 1 lac, in his ITR of 2007 and not of Rs. 3 lacs.

18. The statement of the accused was recorded on 15.04.2014 wherein in response to question no. 5, he has admitted of having availed a total loan of Rs. 8 lacs., and has stated that he returned Rs. 8.80 lacs. to the complainant.

19. The Trial Court, on going through the documents placed on record, took note of the fact that a legal notice for repayment of loan was sent by the complainant to the accused on 13.12.2010, and the same was not denied by the accused. As per that notice, the accused was asked to pay a loan amount of Rs. 10 lacs. within a period of 7 days. The cheques in question, as has been noted by the Trial Court, is dated 2011. The Trial Court, therefore, came to the opinion that such issuance of cheque was only pursuant to the notice dated 13.12.2010, which notice was not denied by the accused and therefore, the cheques were issued in discharge of a legally enforceable debt. The Trial Court, further took notice of the fact that neither of the parties had placed on record any loan agreement or receipt. It was the admission of the accused that he had taken a loan from the complainant. The difference between the assertions made in the complaint and the admission of the accused was only with

respect to the quantum of loan. The assertion of the complainant is Rs.10 lacs. whereas the admission of the accused is of Rs.8 lacs. The Trial Court, therefore, believing the statement of the complainant and his two witnesses convicted the petitioner by holding that the accused could not rebut the presumption under Section 118/139 of the NI Act and sentenced him as aforesaid.

20. Let it be noted that the Trial Court recorded the arguments of the parties and while recording so, a reference was made to the composition/settlement between the parties but the parties disputed their liabilities.

21. For the same reasons, as recorded by the Trial Court, the Appellate Court sustained the conviction of the petitioner but modified the sentence by directing the petitioner to pay a fine amount on an enhanced rate of interest, i.e. @ 11% p.a. within a period of 2 months and in default of payment of compensation, the petitioner was directed to undergo SI for a period of 3 months.

22. What is clearly noticed by this Court is that the complainant/CW-1 had made contradictory statements during his cross examination at two places. At one place, he has denied the suggestion that he gave Rs.10 lacs. to the accused and at the other place, he has admitted that the accused had taken a sum of Rs.8 lacs. from him. The other anomaly in the statement of the complainant is that he has admitted the fact that he

took cheques in question from the accused for security purposes at the time of handing over the money to the accused.

23. If loan was taken by the accused, according to the complainant for a period of 2 years, the cheques, even if taken as security, would not have been dated of the year 2011. A bare reading of the complaint makes it clear that the loan of Rs.10 lacs., as alleged by the complainant, was taken for a period of 2 years wherein it was assured by the accused that he principal amount plus interest would be returned in that period. In that event, it raises a suspicion as to why the cheques which were accepted by the accused in the year 2007 only, were signed and dated for 2011.

24. The Trial Court gave a different logic for believing such cheques to have been given in discharge of a legally enforceable debt. The notice which was given to the accused on 13.02.2010, was not specifically denied. The Trial Court, therefore, believed that the aforesaid cheques were only pursuant to the notice and therefore there was a presumption under Section 139 of the NI Act of the complainant being a holder in due course. What the Trial Court forgot and missed to notice is the specific statement of the complainant in his cross examination that he has accepted the cheques as security and those cheques were handed over to him in the year 2007. Thus, the reasoning given by the Trial Court for believing the assertions of the complainant is not correct. The petitioner accused, in order to buttress his contention, has drawn the attention of the court to the orders dated 12.05.2011 and 27.09.2011 passed by the

learned Metropolitan Magistrate in complaint cases No.958/1, 959/1, 960/1 and 962/1.

25. The ordersheets of the respective dates, referred above, of the Court of the learned Metropolitan Magistrate is reproduced below.

*“CC No.958/1, 959/1, 960/1 and 961/1
12.05.2011*

Present: Sh.Amit Kumar, Ld. Counsel for the complainant with complainant in person.

Accused in person.

A settlement has been arrived at between the parties in four complaint cases CC No. 958/1, 959/1, 960/1, 961/1, 961/1, in the following terms

- i.that the accused shall be paying a sum of Rs. ten lacs. to the complainant towards the settlement.*
- ii.that the accused shall be paying the said amount within two years.*
- iii.that out of this sum of Rs. ten lacs., Rs. Sixty thousands has already been paid by the accused and admitted by the complainant.*
- iv.that the accused shall be paying a sum of Rs. Four lacs. by way of interest to the complainant by the end of 2014.*

Statement of the complainant and the accused as to the composition has been recorded separately.

In view of the composition arrived at between the parties, put up for consideration at the lok adalat on 09.07.2011.

Ahlmad is directed to sent the complete file to the DLSA today itself.

*CC No.958/1, 959/1, 960/1 and 961/1
27.09.2011*

Present: Complainant in person.

Accused in person.

A composition was arrived at between the parties in the court on 12.05.2011 wherein the accused agreed to pay a sum of Rs. 14,00,000/- to the complainant.

It is submitted by the complainant that he has received a sum of Rs.8,80,000/- from the composition amount of Rs. 14,00,000/- and Rs.5,20,000/- still remains to be paid.

It is submitted by the accused he is not in a position to honour the composition.

It is submitted by the accused that he has no means to engage a counsel.

Accused is directed to appear before DLSA at Room No. 507.

It is 12:00 Noon

Present: Complainant in person.

Accused in person after seeking guidance from the DLSA.

Now to come up on 28.11.2011 for F/P.”

26. From the perusal of the aforesaid ordersheets, it would appear that an attempt was made at composition of the offences but the accused was not in a position to honor the commitment. However, the Trial Court has recorded the statement of the complainant that he has received a sum of Rs.8.80 lacs. by the accused. The aforesaid ordersheets were recorded prior to the cross examination of the complainant on 02.11.2012.

27. The Appellate Court has rejected such statement of the complainant that he has received Rs.8.80 lacs. from the accused on the ground that the settlement agreement was not brought on record and no witness was examined in that regard.

28. What appears to be disconcerting and doubtful to this Court is that the complainant arranged for such money for his employer at a very high rate of interest. The money which was arranged by the complainant from his friend has also not been referred to in their respective ITR of the year 2007.

29. The above noted facts in conjunction with the specific statement made in para 5 of the complaint lodged by the respondent that the accused agreed to pay interest @ 24% p.a. on the said amount of Rs.3 lacs. which was given as last of the installment through the complainant's own funds and resources, makes the entire case of the prosecution doubtful. Admittedly, the complainant had arranged for Rs.7 lacs. from his friend and relatives at a very high rate of interest. The complainant would not have been made payments of interest to his lenders on his own. The prosecution version therefore fails at the seams.

30. For the offences under Section 138 of the NI Act to be brought home, what is required is:

I. That there should be a legally enforceable debt;

- II. That the cheque is drawn up from the account of bank for discharge in whole or in part of any debt or other liability which pre-supposes the legally enforceable debt; and
- III. That the cheques so issued had been returned due to insufficiency of funds.

31. The proviso appended to Section 138 of the Act provides for compliance of legal requirements before the complaint petition could be acted upon by a Court of Law.

32. Section 139 of the Act reads as under:

"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."*

33. Section 139 of the Act merely raises a presumption in favour of the holder of a cheque that the same has been issued for discharge of any debt or other liability. The existence of a legally recoverable debt is not presumed under Section 139 of the Act.

34. In Krishna Janardhan Bhat vs. Dattatreya Hegde: (2008) 4 SCC 54, the law with respect to the burden of proof while dealing with the presumptions under Section 139 of the Negotiable Instruments Act, has been succinctly adumbrated. The relevant portion of the said judgment is being reproduced herein below:

"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.

33. In Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [(1999) 3 SCC 35] interpreting Section 118(a) of the Act, this Court opined: (SCC pp. 50-51, para 12)

"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.”

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.*

35. *A statutory presumption has an evidentiary value. The question as to whether the presumption stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.*

36. *In M.S. Narayana Menon v. State of Kerala [(2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30] it was held that once the accused is found to discharge his initial burden, it shifts to the complainant.*

37. *Four cheques, according to the accused, appear to have been drawn on the same day. The counterfoil of the chequebook, according to the appellant, was in the*

handwriting of R.G. Bhat wherein it was shown that apart from other payments, a sum of Rs 1500 was withdrawn on a self-drawn cheque. The courts below proceeded to hold that the defence raised by the appellant has not been proved, which, in our opinion, is not correct. He did not know that the said cheque had not been encashed. He replied to the notice thinking that one of the cheques has been misused. There is nothing on record to show that he knew that one of the cheques was still with R.G. Bhat.

38. Disputes and differences between him and R.G. Bhat stood established by admission of the respondent himself. Similar industry was being run by R.G. Bhat although he was acting as the constituted attorney of the appellant. According to the appellant, R.G. Bhat had cheated him. The counterfoil showed that not more than Rs 20,000 had ever been withdrawn from that Bank at a time. The courts were required to draw an inference as to the probability of the complainant's advancing a sum of Rs 1.5 lacs. on mere asking and that too without keeping any documentary proof. Even there was no witness. The purported story that the appellant would himself come forward to return the amount by a cheque knowing fully well that he did not have any sufficient funds is difficult to believe.

39. In K. Prakashan v. P.K. Surenderan [(2008) 1 SCC 258 : (2008) 1 SCC (Cri) 200 : (2007) 12 Scale 96] this Court following M.S. Narayana Menon [(1999) 3 SCC 35] opined: (K. Prakashan case [(2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30] , SCC p. 263, paras 13-14)

“13[12]. 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. Having regard to the definition of terms 'proved' and 'disproved' as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-à-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

14[13]. 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.”

40. *In John K. John v. Tom Varghese [(2007) 12 SCC 714 : JT (2007) 13 SC 222] this Court held: (SCC p. 717, para 11)*

“11[10]. ... The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the Court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only had no document been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent was not even in a position to discharge his burden to pay

instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken.”

41. *Mr Bhat relied upon a decision of this Court in Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16 : 2001 SCC (Cri) 960] wherein this Court held: (SCC pp. 24-25, paras 22-23)*

“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 exist, 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. A fact is said to be proved when, ‘after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man

ought, under the circumstances of the particular case, to act upon the supposition that it exists'.

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

(See also K.N. Beena v. Muniyappan [(2001) 8 SCC 458: 2002 SCC (Cri) 14] .)

42. We assume that the law laid down therein is correct. The views we have taken are not inconsistent therewith."

35. After espousing the law in this regard, the Supreme Court also took note of certain other aspects namely, presumption of innocence being a human right and the requirement of a cautious approach in determining the compatibility between the concepts of reverse burden and presumption of innocence. The above noted elucidation is as follows:

"44. The presumption of innocence is a human right. (See Narendra Singh v. State of M.P. [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893], Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057] and Rajesh Ranjan Yadav v. CBI [(2007) 1 SCC 70: (2007) 1 SCC (Cri) 254]) Article 6(2) of the European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's

rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact. In a recent article The Presumption of Innocence and Reverse Burdens: A Balancing Duty published in 2007 CLJ (March Part) 142 it has been stated:

“In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice—where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.”

45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. 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. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same."

36. Section 271(d) of the Income Tax Act, 1961, specifically provides that if a person takes or accepts any loan or deposits in any contravention of the provision of Section 269-SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of loan or deposit so taken or accepted.

37. It is difficult to believe the assertions of the complainant since the entire amount of Rs.10 lacs. has been paid in cash to the accused. That apart, in the source, through which Rs.7 lacs. of money was garnered by the complainant namely his relative and his associate, there is no reference in their ITR of such loan having been advanced. CW-2 has even gone to the extent of saying that an amount of only Rs.1 lac was shown as loan in his ITR of the year 2007.

38. Learned counsel for the complainant referred to the decision of ICD vs. Beena Shabir and Anrs.: 2002(6) SCC 426 wherein the Supreme Court has held that the security cheques also would fall within the purview of the Section 138 of the NI Act and a person could not escape his liability. As such, when there is existence of debt on the date of presentation of the cheque and the security cheques issued are dishonoured, the accused would be liable under Section 138 of the NI Act.

39. In Collage Culture and Ors. vs. Apparel Export Promotion Council: 2007 (99) DRJ 251, a distinction has been drawn between two kinds of cheques namely one issued in discharge in *presenti* but payable in future and the other issued in respect of a debt which comes into existence on the occurrence of a contingent event, and is not in existence on the date of issue of a cheque. The latter cheque, being by way of security cheque, will not be covered under Section 138 of NI Act. In the aforesaid decision, definition of the word 'due' has been given as 'outstanding on the relevant date'. The Court, therefore, held that the debt has to be in existence as a crystallized demand akin to liquidated damages and not a demand which may or may not come into existence. However, in Suresh Chand Goyal vs. Amit Singhal (Crl.A. 601/2015 decided on 14.05.2015) the concept of security cheques were discussed. It was held in the aforesaid case:

“28. There is no magic in the word “security cheque”, such that, the moment the accused claims that the dishonoured

cheque (in respect whereof a complaint under Section 138 of the Act is preferred) was given as a “security cheque”, the Magistrate would acquit the accused. The expression “security cheque” is not a statutorily defined expression in the NI Act. The NI Act does not per se carve out an exception in respect of a ‘security cheque’ to say that a complaint in respect of such a cheque would not be maintainable. There can be myriad situations in which the cheque issued by the accused may be called as security cheque, or may have been issued by way of a security, i.e. to provide an assurance or comfort to the drawee, that in case of failure of the primary consideration on the due date, or on the happening (or not happening) of a contingency, the security may be enforced. While in some situations, the dishonor of such a cheque may attract the penal provisions contained in Section 138 of the Act, in others it may not.”

40. Relying on the aforesaid dicta, a bench of this Court in *Credential Leasing & Credits Ltd. vs. Shruti Investments and Anrs.*: 2015 (151) DRJ 147 held as under:

“30. Thus, I am of the considered view that there is no merit in the legal submission of the respondent accused that only on account of the fact that the cheque in question was issued as security in respect of a contingent liability, the complaint under Section 138 of the NI Act would not be maintainable. At the same time, I may add that it would need examination on a case to case basis as to whether, on the date of presentation of the dishonoured cheque the ascertained and crystallized debt or other liability did not exist. The onus to raise a probable defence would lie on the accused, as the law raises a presumption in favour of the holder of the cheque that the dishonoured cheque was issued in respect of a debt or other liability.”

41. The claim of the complainant does not falter on the issue of acceptance of security cheques; rather the complainant has not been able to make out a case that the security cheques were issued in discharge of a legally enforceable debt. Security cheques per se would not get out of the ambit of Section 138 of the NI Act, but in the facts of the present case, viz. the circumstance in which the security cheque is said to have been issued by the accused and accepted by the complainant and the admission of the complainant about his having accepted Rs.8 lacs. from the accused and his denial of having paid Rs.10 lacs. to the accused (referred to the cross examination of CW-1), the case of the complainant appears to be highly doubtful.

42. Thus both the judgment and orders cannot be sustained in the eyes of law and are hereby quashed.

43. The Revision Petition is allowed.

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1. In view of the petition having been allowed, this application has become infructuous.

2. This application is disposed of accordingly.

ASHUTOSH KUMAR, J

SEPTEMBER 15, 2015

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