

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

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Reserved on: 9th March, 2018

Decided on: 17th September, 2018

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CRL.A. 432/2016

KRISHAN @ KRISHAN PAL TANWAR

..... Appellant

Represented by: Mr. Amit Gupta, Advocate
with appellant in person

versus

ROHTAS KUMAR VERMA

..... Respondent

Represented by: Mr. Satyapal Singh,
Advocate with respondent in
person

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeal is directed against the judgment dated 27th May, 2015 passed by the learned Chief Metropolitan Magistrate in CC No.6722/14, titled as '*Krishan @ Krishan Pal Tanwar v. Rohtas Kumar Verma*', whereby the said complaint preferred by the appellant under Section 138 of the Negotiable Instruments Act, 1881 was dismissed and the respondent/accused was acquitted.

2. Briefly stated, the appellant's case is that in August, 2007 the appellant and respondent had filled up tender in Uttrakhand Roadways, Dehradun in five numbers of ₹10,000/- each. The appellant had paid the cost of five tenders which the respondent had filled up that is ₹50,000/- on behalf of the respondent. Appellant also paid ₹6,15,000/- to body makers on behalf of the respondent for preparing body of his five buses. Respondent financier bank paid ₹2,50,000/- and a cheque of ₹25,000/- was paid by

Oberoi motors. Out of ₹6,65,000/-, the appellant received ₹2,75,000/-, thus the respondent was liable to pay ₹3,90,000/- to the appellant. Further, the respondent had also purchased goods for ₹5,400/- by using his credit card. In July, 2008, when the respondent was in Haridwar, the appellant through one Sunil paid ₹2,000/- to the wife of the respondent as per his telephonic request. The appellant also paid an interest amount of ₹5,000/- to Pappu on behalf of the respondent in July, 2008 and ₹3,750/- for repair of tyres of his vehicle at Dehradun on behalf of the respondent.

3. In August, 2008 the account was settled between the respondent and the appellant which included an amount of ₹84,000/- towards interest from 1st April, 2008 to 15th December, 2008 against the principal amount, in discharge of total liability of ₹4,90,150/- to the appellant, the respondent issued a post dated cheque bearing No. 054813 dated 15th December, 2008 for a sum of ₹4,90,000/- drawn on IndusInd Bank Ltd., Punjabi Bagh, New Delhi in favour of the appellant. Upon presentation, the cheque was dishonoured vide return memo dated 20th December, 2008 with remarks "*funds insufficient*". Consequently, appellant approached the respondent and informed him about the dishonour of the cheque. Thereafter, the respondent requested the appellant to present the cheque again, however, it was again dishonoured vide return memo dated 6th January, 2009. Consequently, legal notice dated 16th January, 2009 was sent to the respondent vide registered AD and UPC demanding to make the payment towards the cheque amount within the stipulated time. Since the respondent failed to make the payment, the appellant preferred the complaint.

4. Respondent was summoned for offence punishable under Section 138 NI Act vide order dated 10th February, 2009. Notice was framed against the

respondent on 3rd July, 2009. Appellant was examined as CW-1. Statement of respondent was recorded. Respondent led evidence by examining Manoj @ Pappu (DW-1), Moin Khan (DW-2) and Asif (DW-3) and also examined himself as DW-4.

5. Original cheque bearing 054813 dated 15th December, 2008 was proved vide Ex. CW-1/1, counter foil deposit slip vide Ex. CW-1/1A and Ex. CW-1/3A, return memos dated 20th December, 2008 and 6th January, 2009 were proved vide Ex.CW-1/2 and Ex. CW-1/3 respectively, legal notice dated 16th January, 2009 vide Ex.CW-1/4, registered post and UPC receipt vide Ex.CW-1/5 and Ex. CW-1/6 and AD card signed by the respondent as Ex.CW-1/7.

6. Moin Khan stated that he made body of five buses out of which three buses were of the appellant and two buses were of the respondent. He further stated that ₹9,000 was still to be paid to him by the respondent and ₹45,000 was outstanding against the appellant. He admitted his signature on the receipt dated 31st October, 2007 wherein he had received Rs. 75,000/- from the appellant. He stated that ₹2,50,000/- was paid to him for body making of five buses of the respondent by the finance company that is IndusInd Bank through a cheque drawn in the name of his brother Ashraf.

7. Asif deposed that in 2007 he received an order for making body of three buses of the appellant and three buses of the respondent. He stated that all the payments were made jointly by the appellant and respondent and ₹54,000/- was still outstanding from them. He stated that he had received a cheque of ₹2,00,000/- from the finance company of the respondent. He identified his signatures on the receipt dated 31st October, 2007 (Ex. DW-3/A). During cross-examination, he stated that the first payment of ₹75,000/-

for making of body was made by the appellant on 31st October, 2007. Respondent who was examined as DW-4 stated that he used to keep some of his blank cheques at his house and Rakesh, employee of appellant, used to collect the cheques from his house at the instance of the appellant. The said cheques were only signed by him and rest of the contents used to be filled by the appellant. He used to remain at Dehradun to look after the operation of buses and the appellant used to handle his financial transactions.

8. Learned Counsel for the appellant submits that the learned Trial Court failed to consider that the appellant had led evidence to show the liability for an amount of ₹4,90,000/- towards the respondent accused and thus the cheque No.054813 dated 15th December, 2008 issued for a sum of ₹4,90,000/- was in discharge of the cumulative liability. In his cross-examination the respondent admitted that he used to keep blank signed cheques in his home and the employee of the appellant namely Rakesh used to collect the said cheques from his home at the instance of the respondent. Thus, if the duly signed cheques were collected at the instance of the respondent the same could not be misused. It was also the case of the appellant that the amounts were paid to the respondent towards the expenses for running the buses also and the respondent in his cross-examination admitted that he used to stay at Dehradun to look after the operation of the buses and the petitioner used to handle the financial transactions. The respondent has admitted that a sum of ₹50,000/- at the rate of ₹10,000/- for each of the buses was paid by the appellant towards the tender amount however no material has been shown that the said amount was returned to the appellant. From the cross-examination of Manoj, it is clear that the respondent requested him to advance a loan of ₹2,00,000/- and to pay the

same to the appellant herein who handed over him a sum of ₹1,95,000/- keeping ₹5,000/- as advance interest. That the appellant paid the interest @ ₹5,000/- per month till July, 2008. The appellant having proved the legal liability, respondent could not have been acquitted of the offence punishable under Section 138 NI Act.

9. On the other hand, learned counsel for the respondent submits that in view of the testimony of the defence witnesses including himself the respondent has rebutted the presumption that he owed a sum of ₹4,90,000/- towards the appellant in lieu whereof the cheque which was dishonoured, was issued.

10. Contention of learned counsel for the appellant is that the liability of the respondent was also not only the money paid for the tender and body building of the five buses of the respondent but also the running expenses. However, in the entire evidence, the appellant has not given the running expenses and beyond the liability of ₹6,65,000/- as noted above, he admitted having received ₹2,75,000/- leaving a balance of ₹3,90,000/-. According to the appellant ₹5,400/- were paid to the respondent through his credit card thus making it a total of ₹3,95,400/-. ₹2,000/- he paid at the house of the respondent and also paid an interest amount of ₹5,000/- besides ₹3,750/- for the repair of the tyres at Dehradun.

11. Supreme Court in the decision reported as (2010) 11 SC 441 Rangappa v. Sri Mohan has at length discussed the scope and legislative intent of the Sections 118, 138 & 139 of the NI Act as follows:

“17. In the course of the proceedings before this Court, the contentions related to the proper interpretation of Sections 118(a), 138 and 139 of the Act. Before addressing them, it would be useful to quote the language of the relevant provisions:

“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, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the

holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, ‘debt or other liability’ means a legally enforceable debt or other liability.

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.”

18. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act. With respect to the facts of the present case, it must be clarified that contrary to the trial court's finding, Section 138 of the Act can indeed be attracted when a cheque is dishonoured on account of “stop payment” instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. This position was clarified by this Court in Goaplast (P) Ltd. v. Chico Ursula D'Souza [(2003) 3 SCC 232 : 2003 SCC (Cri) 603] , wherein it was held: (SCC pp. 232g-233c)

“Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. The said provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque.

In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong.”

20. *The counsel appearing for the appellant-accused has relied on a decision given by a Division Bench of this Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] , the operative observations from which are reproduced below: (S.B. Sinha, J. at SCC pp. 61-63, paras 29-32 & 34)*

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

- (i) that there is a legally enforceable debt;*
- (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and*
- (iii) that the cheque so issued had been returned due to insufficiency of funds.*

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

31. *The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to*

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

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of 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."

(emphasis supplied)

19. It has been contended on behalf of the appellant-accused that the presumption mandated by Section 139 of the Act does not extend to the existence of a legally enforceable debt or liability and that the same stood rebutted in this case, keeping in mind the discrepancies in the complainant's version. It was reasoned that it is open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. It has been contended that since the complainant did not conclusively show whether a debt was owed to him in respect of a hand loan or in relation to expenditure incurred during the construction of the accused's house, the existence of a legally enforceable debt or liability had not been shown, thereby creating a probable defence for the accused.

21. Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed: (*Krishna Janardhan Bhat* case [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] , SCC p. 66, para 45)

“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.”

(emphasis supplied)

22. With respect to the decision cited above, the counsel appearing for the respondent claimant has submitted that the observations to the effect that the “existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act” and that “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” (see p. 62, para 30 in *Krishna Janardhan Bhat* [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166]) are in conflict with the statutory provisions as well as an established line of precedents of this Court. It will thus be necessary to examine some of the extracts cited by the respondent claimant. For instance, in *Hiten P. Dalal v. Bratindranath Banerjee* [(2001) 6 SCC 16 : 2001 SCC (Cri) 960] , it was held: (*Ruma Pal, J.* at SCC pp. 24-25, paras 22-23)

“22. Because both Sections 138 and 139 require that the court ‘shall presume’ the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ... it is obligatory on

the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. 'It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused.' ... Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court 'may presume' a certain state of affairs. 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'."

(emphasis supplied)

23. The respondent claimant has also referred to the decision reported as Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm [(2008) 7 SCC 655] , wherein it was observed: (SCC p. 660, para 17)

“17. Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal.”

24. This decision in *Mallavarapu Kasivisweswara Rao* case [(2008) 7 SCC 655] , then proceeded to cite an extract from the earlier decision in *Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal* [(1999) 3 SCC 35] : (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. 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.”

(emphasis supplied)

Interestingly, the very same extract has also been approvingly cited in Krishna Janardhan Bhat [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] .

25. With regard to the facts in the present case, we can also refer to the following observations in *M.M.T.C. Ltd. v. Medchl Chemicals & Pharma (P) Ltd.* [(2002) 1 SCC 234 : 2002 SCC (Cri) 121] : (SCC p. 240, para 19)

“19. ... The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions 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 were 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.”

(emphasis supplied)

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 : (2008) 2 SCC (Cri) 166] 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 or 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.

12. Thus, evidence of the appellant resting mainly on ₹50,000/- paid as money for tenders, ₹6,15,000/- to body makers for five buses of respondent and the appellant admittedly receiving back ₹2,75,000/-, evidence of defence witnesses Moin Khan and Asif who prepared the bodies of the five buses of the respondent is relevant. As noted above, they have deposed that part money was paid by the respondent and part money for the body building of the buses was also received from Indus Bank. Learned Trial Court has analyzed the same as under:

“10. I have noted the above two testimonies in slight detail as they have a bearing on the alleged liability of the accused. A few things emerge very clearly from them. Firstly, the body making charges for each bus, whether it was made by DW2 or DW3, were ₹1,22,000/- per bus and not ₹1,23,000/- as claimed by the complainant. Secondly, accused had made at least part payment to both the above body makers. While DW3 specifically deposed having received ₹31,000/-, DW2 stated that both the complainant and the accused made separate payment for their respective buses. Though DW2 subsequently stated that complainant made all the payments yet his earlier statement seems more reliable because DW2 specifically stated dues outstanding from both the complainant and the accused. It implied that DW2 maintained separate account of dues from the complainant and the accused which would have been necessitated only when the complainant and the accused made separate payments for their respective buses.

11. Complainant stated in his testimony that he made payment for all the buses (to both the body makers) and whenever accused made cash payment to the body makers, the same was

made only on his behalf. The above statement, however, does not find any corroboration from the testimony of DW2 and DW3 as noted above. No counter suggestion on the same lines was also put to any of the above DWs. More particularly, testimony of both the above DWs regarding dues still outstanding from both the complainant and the accused has virtually gone unchallenged as no counter suggestion whatsoever was put to any of the above two witnesses during their cross examination.

12.As per the complainant, he made entire payment of ₹6,15,000/- for body making of 5 buses of the accused @ ₹1,23,000/- per bus. However, it emerges clearly from the above testimonies that the body making charges were in fact ₹1,22,000/- per bus and secondly that complete payment in respect of all the buses was yet to be made to both the body makers. Complainant himself stated that no separate account was maintained for making of 5 buses of the accused. The receipt Ex. DW3/X, which was a hand written record maintained by the complainant, is also based on the cost of one body making ₹1,22,000/- only. It records payments made to Asif (meaning thereby DW3 Ashraf) of ₹3,66,000/- (for 3 buses) and a similar payment for similar number of buses to Moin (same as DW2). However, in fact, body of 5 buses was made by DW2 and of 6 buses by DW3 as deposed by them. There is nothing on record even to faintly suggest that the entire payment as shown as per the above receipt Ex. DW3/X was meant for buses belonging to the accused only. Rather, complainant himself stated in his testimony that no separate record was kept for body making of each of the buses. Further, the above statement was acknowledged only by DW3 Asif and the same never put to DW2 Moin.

13.Calculating the cost of body making @ ₹1,22,000/- per bus would reduce the liability of the accused at least ₹5,000/- (i.e. ₹1,000/- per bus). Part payment of ₹31,000/- made by the accused to DW3 would reduce his liability further to the extent. As noted above, dues of ₹9,000/- (towards accused alone) remaining to be paid to DW2 and ₹54,000/- (jointly)

remaining to be paid to DW3 meant that entire dues of body making were yet to be paid. In my considered opinion, the above facts in themselves are sufficient to rebut presumption u/s 118 and 139 NI Act arising in favour of the complainant.

14. Case of the complainant, as noted in para 2 above, is that the cheque in question was issued by the accused towards settlement of various dues. There are, however, many circumstances which render the existence of such a settlement highly improbable. It was testified by the accused that the expenses towards running of the buses were yet to be settled between them. No counter suggestion was put to him in this respect on behalf of the complainant. The above settlement, however, also included a minor sum of ₹3,750/- for repair of tyres of bus belonging to the accused at Dehradun. Now, the above item clearly pertained to running expenses of the buses and was, did not fit in the alleged oral settlement and was clearly out of place.

15. Accused also deposed that his blank signed cheques used to be kept with the complainant and complainant has misused one such cheque and filed the same in the present case. Complainant also admitted during his testimony that he used to obtain cheques signed by the accused from his family members and used to fill the particulars themselves. Complainant has not stated anywhere the date on which the present cheque was handed over and also as to who handed over the same. There is also no witness to the alleged oral settlement or to the handing over of the cheque in question. Complainant has also not explained in whose presence the above oral settlement took place nor has he brought any witness to the said oral settlement on record. The complainant also did not explain how the interest amount ₹84,000/- forming part of the liability of the accused and included in the alleged oral settlement, was arrived at.”

13. On appreciation of evidence led by the parties it is amply clear and as rightly noted by the learned Trial Court that the appellant has not been able

to prove the liability for a sum of ₹4,90,000/-. Hence, this Court finds no error in the impugned judgment.

14. Appeal is accordingly dismissed.

15. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 17, 2018
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