

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

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Reserved on: 1st May, 2018

Decided on: 10th May, 2018

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CRL.A. 443/2017

M/S S.S. DIAMONDS INTERNATIONAL THROUGH ITS
PROPRIETOR

..... Appellant

Represented by: Mr. Naveen Sharma and Mr.
Ashish, Advocates.

versus

NAMEETA SHARMA

..... Respondent

Represented by: Mr. Vivek Sood, Senior
Advocate with Mr. B.K.
Pandey and Mr. Siddharth
Gupta, Advocate.

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CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeals are directed against the judgment dated 29th October, 2015 passed by the learned Additional Chief Metropolitan Magistrate in CC Nos. 120/14 (Crl.A. No.443/2017), 21/14 (Crl.A. No.444/2017), 41/14 (Crl.A. No.445/2017) and 174/14 (Crl.A. No.446/2017), titled as '*M/s S.S. Diamonds International v. Nameeta Sharma*', whereby the complaints preferred by the appellant under Section 138 of the Negotiable Instruments Act, 1881 (in short 'NI Act') were dismissed and the respondent/accused was acquitted.

2. Learned Counsel for the appellant submits that learned Trial Court conducted trial in an arbitrary manner by not examining the respondent under Section 313 Cr.P.C. He contends that the documents filed by the

respondent for return of jewellery were photocopies, thus, inadmissible in evidence. While placing reliance upon the decisions of Supreme Court reported as JT 2011 (3) 3 SC 522 H. Siddiqui (dead) by LRs v. A. Ramalingam and (2016) 16 SCC 483 Rakesh Mohindra v. Anita Beri and Others, it is submitted that admission of a document in evidence does not amount to the proof of contents of the document. It is further submitted that contents of documents of a secondary evidence cannot be admitted in evidence without production of the original, for which reliance is placed upon the decision of Supreme Court reported as JT 2007 (6) SC 64 Smt. J. Yashoda v. Smt. K. Shobha Rani. Lastly, it is urged that non disclosure of the loan amount in the ITR is not fatal to the case and to buttress this argument, reliance was placed upon the decision of coordinate bench of this Court reported as 2015 (221) DLT 585 Lekh Raj Sharma v. Yash Pal Gupta.

3. On the other hand, learned counsel for the respondent submits that Amarjeet Singh (CW-1) admitted the receipts of jewellery vide Ex.CW-1/D1 to Ex.CW-1/D3, signatures on Ex.CW-1/D4 and handwriting on Ex.CW-1/D5 in his cross examination. Furthermore, the original documents were shown and returned. Thus, the respondent proved the documents in accordance with the law.

4. Before dealing with the facts of the case it would be apposite to note the law on presumption and burden of proof on the complainant in a complaint under Section 138 NI Act. Supreme Court in the decision reported as (2008) 1 SCC 258 K. Prakashan v. P.K. Surenderan, while dealing with nature of presumptions and burden of proof on the parties in a complaint under Section 138 of Negotiable Instruments Act held as under:

13. The Act raises two presumptions: firstly, in regard to the passing of consideration as contained in Section 118(a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118(a) and 139 are rebuttable in nature. 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. 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.

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

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.

6. Briefly stated, the appellant's case is that the respondent purchased diamonds/jewellery from the appellant on credit bases which was acknowledged by the respondent vide MOU dated 18th October, 2012 and in discharge of her liability, she issued post dated cheques including cheque Nos. 958216 dated 18th February, 2014 for a sum of ₹5.50 lakhs drawn on Punjab National Bank, Madhuban Branch, 115369 dated 6th December, 2013 for a sum of ₹7 lakhs drawn on ICICI Bank, Preet Vihar Branch, 958218 dated 19th December, 2013 for a sum of ₹5.50 lakhs drawn on Punjab National Bank, Madhuban Branch and 958217 dated 23rd April, 2014 for a sum of ₹5.50 lakhs drawn on Punjab National Bank, Madhuban Branch in favour of the appellant. On presentation of the aforesaid cheques, they were dishonored vide return memos dated 22nd February, 2014, 14th December, 2013, 21st December, 2013 and 1st May, 2014 respectively with the remarks 'Insufficient Funds'. Thereafter, appellant sent legal notices dated 24th March, 2014, 30th December, 2013, 30th January, 2014 and 12th May, 2014

respectively through registered AD. Despite notices having been served, respondent failed to make the payment within statutory period. Hence, the complaints.

7. Appellant led pre-summoning evidence. Thereafter, respondent was summoned under Section 138 NI Act vide orders dated 30th April, 2014, 18th February, 2014, 12th March, 2014 and 6th June, 2014 respectively. Notice was framed against the respondent on 23rd July, 2014 and in her defence, respondent stated that she had returned jewellery articles worth ₹23,50,000/- against receipt from the appellant and had also paid ₹10,50,000/- to the appellant. However, out of the 6 cheques taken by the appellant on security basis, two cheques totaling to ₹10,50,000/- were returned to her, whereas the other cheques were not handed over and the unreturned cheques were manipulated to falsely implicate her in complaint cases.

8. Amarjeet Singh, proprietor of appellant, was examined as CW-1. He reiterated the contents of the complaint in his evidence by way of an affidavit which was proved vide Ex.CW-1/A. Original cheques were proved vide Ex. CW-1/1, return memo was proved vide Ex.CW-1/2, legal notices as Ex.CW-1/4, original postal receipts as Ex.CW-1/5 and replies of the respondent to the legal notices were proved as Ex.CW-1/6.

9. Statement of the respondent was dispensed with as all the incriminating facts were put to the respondent at the stage of framing of notice. Respondent did not lead any defence evidence instead she filed her written statement under Section 313 read with Section 314 Cr.P.C.

10. In order to prove the defence, respondent cross examined the appellant. Relevant extract of the cross-examination of the appellant is as under:

Annexure A is the list of articles. Articles mean jewellery. The goods/jewellery as mentioned in Annexure A has been delivered to the accused on approval basis. That's why no bill/invoice was prepared against the said jewellery. Approval basis means the purchaser shows their products for sale to their customers and if said customers approve and agree to purchase their goods then that product has become final for sale. As per the requirement of customer I issue the bills/invoices of the product/goods which become final for sale. I have not issued any bill with the respect to goods sold. Vol: Because the bill never demanded by the accused. I have not prepared any bills/invoice for the said supplied goods as alleged in my books of accounts also. It is wrong to suggest since I have not entered any entry of the said sale/approval basis goods to the accused, that's why no goods worth Rs. 34 lakhs as alleged was given to accused and her husband namely Rajesh Sharma on approval basis.

Q. Whether the bill of the goods delivered on approval basis is never prepared?

Ans. The bill is only prepared if the customer asks for the same.

The goods were supplied to Namita Sharma and sometimes her husband also used to accompany her. I have received some payments from the accused of total Rs.5,00,000/- and jewellery of Rs. 5.5 lakhs was returned. I have not shown the said entries in my ITR. Vol: As the goods were received back hence the entry was not made and regarding Rs. 5 Lakhs we had returned the cheque. I have not mentioned the said fact in any of the four complaints. It is wrong to suggest that I had wrongly stated the facts in para 3 of my affidavit. Vol: The six cheques were mentioned as per the MOU.

11. The appellant admitted Ex.CW-1/D1 to Ex.CW-1/D3 regarding receipt of jewellery, signatures on Ex. CW-1/D4 and handwriting on

Ex.CW-1/D5, in the cross-examination as under:

Q: Can you tell the cheque numbers of the two returned cheques?

Ans: One is cheque bearing No. 958215 of ₹5.5 Lakhs drawn on PNB. The detail of the second cheque I do not know, as I had not noted down its detail. The second cheque is however of ₹5 lakhs.

I had received the jewellery returned by the accused, against the cheque of ₹5 Lakhs which was returned by me to accused. It is wrong to suggest that no jewellery was returned against the cheque of ₹5 lakhs and that the accused had paid cash against the return of the said cheque. It is correct to suggest that as per the MOU cash was to be taken by me and that I had to return the cheque on receiving the cash from the accused of the same denomination. However, it is wrong to suggest that the cheque of ₹5 lakhs was returned to the accused on receiving cash from the accused. It is wrong to suggest that the accused has paid me cash of ₹10,50,000/- against the return of the said two cheques of ₹5.5 and 5 lakhs.

(The witness is shown original document Mark XP and is asked whether it bears his signature at point A.)

I am in doubt that whether the said signature is mine or not.

Vol: However, I admit that the articles mentioned in the said document were received by me.

Q: Can you tell the value of the said goods in Mark XP?

Ans: the value of diamonds is ₹2,57,610/-. Gold is 84.932 grams, and its value is as per the market price at that time on CNBC.

I am not sure that the gold market rate on 23.12.2012 was ₹29,300/- per 10 gram. I cannot admit or deny the suggestion that the goods mentioned in Mark XP were worth ₹5,06,460/-.

Vol: As I do not remember the gold value at that time.

(The witness is shown original document Mark XQ and is asked whether it bears his signature at point A.)

The Signature at point A are mine and I also admit the contents of the said document.

Q: Can you tell the value of the said goods in Mark XQ?

Ans: As per my calculation the value of diamonds is ₹1,09,640/.

Gold is 22.708 grams, and its value is as per the market price at that time on CNBC.

I am not sure that the gold market rate on 16.01.2013 was ₹29,300/- per 10 gram i.e the total price of gold was ₹66,534/-. It is wrong to suggest that the value of diamond in the said document is ₹3,36,220/-. I cannot admit or deny the suggestion that the goods mentioned in Mark XQ were worth ₹4,02,754/-. Vol: As I do not remember the gold value at that time.

(The witness is shown original document Mark XR and is asked whether it bears his signature at point A.)

The signature at point A are mine. Vol: it is not related to the present transaction. I also admit the contents of the said document. Vol: It is part of Mark XP.

It is wrong to suggest that Mark XR is direct from Mark XP.

Q: It is put to you that both pair of bangles as mentioned in Mark XR are 44 cart. Solitaire diamonds for two pairs and its value was ₹10,34,000/- and net weight of gold was 51.052 grams and its market value was ₹29,300/- per 10 grams, and the total value of the two pair of bangles was thus ₹11,83,582/- ?

Ans: It is false.

It is wrong to suggest that I have received the two pairs of bangles from the accused amounting to ₹ 11,83,582/- as mentioned in Mark XR. It is further wrong to suggest that I am deliberately showing the contents of Mark XR as part of document Mark XP with mala fide intention.

The documents marked as Mark XP, XQ & XR, being admitted are exhibited as CW-1/D1, D2 & D3 further cross deferred as no time left.

Witness has been shown one slip and is asked whether it bears his signature to which he replied it is his signature at Point A, however, the portion from B to B1 is not his handwriting and the said slip is Ex. CW-1/D4.

Witness has again been shown one another slip and is asked whether it is his handwriting or not, to which he replied it bears his handwriting in all and said slip is Ex. CW-1/D5.

12. In the present case as noted above all original documents were produced by the accused and shown to the appellant and returned before exhibiting the photocopies. Thus the documents Ex.CW1/D1 to Ex.CW1/D5 were proved in accordance with law. Even otherwise an objection as to mode of proof can be taken at the stage of trial only as held by the Supreme Court in the decision reported as (2003) 8 SCC 752 R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple as under:

20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the

marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.

21. *The Privy Council in Padman v. Hanwanta [AIR 1915 PC 111: 19 CWN 929]* did not permit the appellant to take objection to the admissibility of a registered copy of a Will in appeal for the first time. It was held that this objection should have been taken in the trial court. It was observed: (AIR p. 112)

“The defendants have now appealed to His Majesty-in-Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the Will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No

objection, however, appears to have been taken in the first court against the copy obtained from the Registrar's office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention."

13. One of the contentions of the Learned Counsel for the appellant was since the statement of the respondent was not recorded under Section 313 Cr.P.C., trial was conducted in an arbitrary manner. This contention deserves to be rejected in view of the decision of Supreme Court reported as (2000) 8 SCC 740 Basavaraj R. Patil v. State of Karnataka wherein it was observed that Section 313 Cr.P.C. is only for the benefit of the accused and prejudice, if any, can only be caused to the accused for his non-examination under Section 313 Cr.P.C. and not the complainant. Relevant extract of the report is reproduced as under:

18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In Jai Dev v. State of Punjab [AIR 1963 SC 612 : (1963) 1 Cri LJ 495] Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focused on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

"The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective

and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.”

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word “may” in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.

14. Considering the fact that the respondent has probabalised her defence, this Court finds no error in the impugned judgment of the learned Trial Court much less any perversity warranting interference.

15. Appeals are accordingly dismissed.

16. Trial Court records be sent back.

(MUKTA GUPTA)
JUDGE

MAY 10, 2018
‘vn’