IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (U/S) No.4 of 2018

Arising Out of PS. Case No.-855 Year-2014 Thana- PATNA COMPLAINT CASE District-Patna

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Deepak Kumar S/o Late Ramjee Prasad, R/o Nasriganj, P.S.- Danapur, Distt.-Patna. ... ... Appellant/s

Versus

1. State Of Bihar
2. Anil Kumar Gupta S/o Late Jagal Narayan Lal , R/o Mohalla- Bibiganj, P.S.- Danapur, Distt.- Patna.

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Arun,
Mr.Dhananjay Kumar Tiwary
Mr. Amardeep Lokpriya, Advocates
For Respondent No.2 : Mr. Bindhyachal Singh,
Mr. Vipin Kumar Singh,
Mr. Satya Prakash, Advocates.
For the State : Mr.Sri Zeyaul Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

20-08-2019 Instant appeal has been filed in accordance with Section 376(4) of the CrPC after having special leave granted by this Court vide order dated 22.11.2010 under SLA No. 14/2018. It is needless to say that complainant is the appellant and the judgment impugned is dated 08.02.2018 passed by ACJM-1st, Danapur in Complaint Case No. 953/2014, Trial No. 20/2015 (Deepak Kumar v. Anil Kumar Gupta) acquitting Respondent No.2.

2. At the time of admission, the judgment impugned has been gone through and perceiving the finding of the learned lower court under para-4 as well as 9 of the judgment, the Respondent No.2 has been noticed to the effect as to why not the judgment impugned be set aside, waiving the rigour so laid

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down under Section 390 of the CrPC perceiving the nature of offence to be under Section 138 of the NI Act, summons triable, bailable one, whereupon, there has been appearance of Respondent No.2. During midst thereof, lower court record has been called. That means to say, at the stage of admission, the appeal is being disposed of in its finality.

3. Heard the parties.

4. It is the case of the appellant/complainant that he as well as Respondent No.2/accused are bosom friends and in the aforesaid background, in the first week of April 2013, Respondent No.2 had asked for friendly loan on an undertaking that within four months the same would be paid whereupon he had given Rs. 23,76,000/- on 15.04.2013 on the aforesaid understanding. Even after expiry of the aforesaid period when money was not returned back by the Respondent No.2/accused, he demanded and then, the Respondent No.2/ accused handed over two cheques of Punjab National Bank each containing 11,88,000/- on 11.07.2014 and for getting the same credited to his account, deposited in his account standing at Axis Bank but the aforesaid two cheques got dishnoured with a remark that signature is not tallying, and the Bank had communicated the said information on 15.07.2014. Then thereafter, registered

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notice was served on 23.07.2014, even then, the amount has not been paid, consequent thereupon, the complaint petition has been filed on 12.08.2014.

5. The complaint was filed on 12.08.2014 whereupon after examining the complainant on SA, an inquiry in terms of Section 202 CrPC commenced and concluded by an order dated 24.06.2015 whereby the learned lower court had summoned the Respondent No.2 to face trial for an offence punishable under Section 138 NI Act. Accordingly, after appearance, the trial commenced and concluded in a manner, subject matter of instant appeal.

6. It has been submitted at the end of learned counsel for the appellant that the finding recorded by the learned lower court is against the statutory provisions of law whereupon, could not sustain. In order to justify the same, it has been submitted that from para-4 of the judgment impugned, it is evident that there happens to be an admission at the end of Respondent No.2/accused regarding issuance of two cheques in favour of appellant, then in that event, the court would have drawn preemption against the Respondent No.2/accused in accordance with Section 139 of the NI Act, though rebuttable and further the learned lower court should have also considered that

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Respondent No.2/accused failed to discharge his onus by way of rebuttal.

7. It has also been submitted that from para-9 of the judgment, it is evident that observation so made by the learned lower court was contrary to Section 139 of the NI Act and in likewise manner, basing upon the principle laid down by the Kerala High Court in Cr. Appeal No. 560/2007 that there should be positive evidence regarding receipt of the notice, happens to be contrary to the principle laid down by the Apex Court wherein it has been observed that there will be presumption in case of notice has been sent through registered post. Apart from this, para-8 as is evident, happens to be contrary to the own admission of the Respondent No.2/accused. In the aforesaid backdrop, it has been submitted that the finding so recorded by the lower court happens to be perverse, cryptic, illegal and is fit to be set aside.

8. On the other hand, learned counsel representing Respondent No.2/accused has submitted that the appeal is not maintainable, more particularly, once having a finding of innocence in ordinary course of nature. It has further been submitted that unless and until appellant succeeds in substantiating that the judgment happens to be contrary to the

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spirit of law, illegal, perverse and further, no other theory than the guilt of accused is found exposed, completely overlooked at the end of the learned lower court causing miscarriage of justice then and then only, the judgment so appealed is to be interfered with, otherwise not.

9. It has also been submitted that non matching of signature would not come within the purview of NI Act. In likewise manner, it has also been submitted that the deficiency whatsoever, persisting in the case of the appellant, is found duly exposed coupled with the fact that prosecution is under obligation to substantiate the date on which notice has been received and that has got a purpose in the background of period so prescribed for launching of prosecution in accordance with Section 142 of the NI Act. As there happens to be negligence and lapses at the end of the appellant/complainant on that very score, the learned lower court had rightly dismissed the claim and acquitted the Respondent No.2/accused.

10. The Hon'ble Apex Court, times without number, has propagated the theory as well as laid down the principles, criteria over which, the appeal against the acquittal could be entertained. Recently, in ***Munishamappa & Ors. v. State of Karnataka*** as reported in ***(2019) 3 SCC 393***, it has been held,

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after perceiving the principles having been noticed at the end of High Court which was dealing with judgment of acquittal under para-10 enumerated thereunder which is as follows:-

> "10. The High Court, in the course of its judgment, adverted to the principles which it was required to follow in an appeal against acquittal, formulating them in the following terms:
>
> 1. In an appeal against acquittal, the Appellate Court would be slow in reversing the judgment of the Trial court unless miscarriage of justice has thereby ensued.
>
> 2. The Appellate Court would not interfere with the order of acquittal even if, based on the evidence on record two views are possible and the view taken by the Trial court is equally plausible.
>
> 3. If the Appellate Court finds that the appreciation of evidence by the Trial court is without evidence or capricious or against the interest of justice, then only the Appellate Court would venture to reverse the order of acquittal.
>
> 4. If after appreciation of the evidence, the Appellate Court independently finds that order of acquittal is not in accordance with law and the conclusion arrived at by the Trial court are not based on the correct appreciation of the evidence on record, and the incident cannot be explained except with the guilt of the Accused and is totally inconsistent with the innocence of the Accused, in such cases only the Appellate Court would reverse the order of acquittal."

Under para-16, it has been further held as follows:-

> "16. The High Court in the present case was dealing with an appeal against acquittal. In such a case, it is well settled that the High Court will not interfere with an order of acquittal merely because it opines that a different view is possible or even preferable. The High Court, in

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other words, should not interfere with an order of acquittal merely because two views are possible. The interference of the High Court in such cases is governed by well established principles. According to these principles, it is only where the appreciation of evidence by the Trial Court is capricious or its conclusions are without evidence that the High Court may reverse an order of acquittal. The High Court may be justified in interfering where it finds that the order of acquittal is not in accordance with law and that the approach of the Trial court has led to a miscarriage of justice. The High Court, however, must be satisfied that the incident cannot be explained except on the basis of the guilt of the Accused and is inconsistent with their innocence.

11. In ***Sampat Babso Kale and Ors. vs. The State of Maharashtra*** reported in ***2019 CrLJ 2428***, it has been held:-

"7. With regard to the powers of an appellate court in an appeal against acquittal, the law is well established that the presumption of innocence which is attached to every Accused person gets strengthened when such an Accused is acquitted by the trial court and the High Court should not lightly interfere with the decision of the trial court which has recorded the evidence and observed the demeanour of witnesses. This Court in the case of Chandrappa and Ors. v. State of Karnataka : (2007) 4 SCC 415, laid down the following principles:

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the

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order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the Accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

12. It is needless to recollect, as per Section 386 CrPC, the appellate court is within its domain to transform the

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judgment of acquittal into judgment of conviction, after getting the same set aside.

13. Now coming to the facts of the case, as is evident, the learned lower court has failed to consider legal requirement coupled with the factual status. It is evident that presumption with regard to registered postal service is attached therewith, once the postal receipt is brought on record as has been observed by the Hon'ble Apex Court in ***Parameswaran Unni v. G. Kannan*** reported in ***2017 CrLJ 2838*** under para-13 which is as follows:-

> "13. It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1872, that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. Then requirements under proviso (b) of Section 138 stands complied, if notice is sent in the prescribed manner. However, the drawer is at liberty to rebut this presumption."

14. Whether remark of the bank relating to signature of the drawer mismatches or differs or no image found signatured or incomplete signature, illegible signature, basis for returning of the dishonour of the cheque would attract prosecution under Section 138 of the NI Act and the same has been answered in affirmative in ***Laxmi Dyechem v. State of***

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Gujarat reported in ***(2012) 13 SCC 375*** wherein it has been held as follows:-

> "16. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in NEPC Micon Ltd. (supra) that the expression "amount of money .... is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act.
>
> 16.1 This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. For instance this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative

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difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied.

16.2 There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial Court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the

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cheque is presumed to have been issued for a valid consideration.

15. How the presumption as provided under Section 139 of the NI Act is to be considered, has properly been explained in ***Kishan Rao v. Shankargouda : 2018 CrLJ 3613*** in following way:-

> "17. Section 139 of the Act, 1881 provides for drawing the presumption in favour of holder. Section 139 is to the following effect:
>
> 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. This Court in Kumar Exports v. Sharma Carpets, : 2009 (2) SCC 513, had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19:
>
> 14. Section 139 of the Act provides that 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.
>
> 15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the

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existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial Under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the Rules of presumptions Under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

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

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is over.

19. This Court held that the Accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:

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

20. ***

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

> 26. In light of these extracts, we are in agreement with the Respondent claimant that the presumption mandated by Section 139 of the Act

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does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, : (2008) 4 SCC 54, may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the Accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

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.

22. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High court coming to the conclusion that the Accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption Under Section 139 can be rebutted

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on the evidence of PW. 1, himself has not been explained by the High court.

16. In ***Rohitbahi Jivanlal Patel v. State of Gujarat: 2019 CrLJ 2400*** wherein the Hon'ble Apex Court was adjudicating upon the finding recorded by the High Court setting aside the order of the lower court and convicting the appellant, observed as follows:-

> "12. For determination of the point as to whether the High Court was justified in reversing the judgment and orders of the Trial Court and convicting the Appellant for the offence Under Section 138 of the NI Act, the basic questions to be addressed to are two-fold: as to whether the complainant-Respondent No. 2 had established the ingredients of Sections 118 and 139 of the NI Act, so as to justify drawing of the presumption envisaged therein; and if so, as to whether the accused-Appellant had been able to displace such presumption and to establish a probable defence whereby, the onus would again shift to the complainant?
>
> 13. We may usefully take note of the provisions contained in Sections 118 and 139, being the special Rules of evidence applicable to the case as follows4:
>
> 118. Presumption as to negotiable instruments. ----- Until the contrary is proved, the following presumptions shall be made:
>
> (a) of consideration ----- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;
>
> (b) as to date---that every negotiable instrument bearing a date was made or drawn on such date;

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(c) as to time of acceptance ----- that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer----that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements----that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps--- that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course----that the holder of a negotiable instrument is a holder in due course;

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence of fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

139. Presumption in favour of holder ---- It shall be presumed, unless the contrary is proved, that the holder is a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, if any debt or other liability.

14. So far the question of existence of basic ingredients for drawing of presumption Under Sections 118 and 139 the NI Act is concerned, apparent it is that the accused-Appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the Accused for a sum of Rs. 3 lakhs each. The said cheques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of

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Sections 118 and 139 are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the accused-Appellant to establish a probable defence so as to rebut such a presumption.

15. In Rangappa v. Sri Mohan : (2010) 11 SCC 441, this Court has reiterated and summarised the principles relating to presumptions Under Sections 118 and 139 of the NI Act and rebuttal thereof in the following:

26. In the light of these extracts, we are in agreement with the Respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it is based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttal 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

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described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the Defendant-accused cannot be expected to discharge an unduly high standard of proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an Accused has to rebut the presumption Under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the Accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the Accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the Accused may not need to adduce evidence of his/her own.

16. On the aspects relating to preponderance of probabilities, the Accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasized that though there may not be sufficient negative evidence which could be brought on record by the Accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged Under Section 118 and 139 of the NI Act. This Court stated the principles in the case of Kumar Exports (supra) as follows:

20. The Accused in a trial Under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or

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that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an Accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The Accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the Accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the Accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the Accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The Accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising Under Sections 118 and 139.

21. The Accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out

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> by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, therefore, the presumptions Under Sections 118 and 139 of the Act will not again come to the complainant's rescue.

17. In ***Bir Singh v. Mukesh Kumar*** reported in ***(2019) 4 SCC 197*** wherein order of acquittal relating to Criminal Revision filed by the respondent/petitioner before the High Court was subject to adjudication wherein it has been observed as follows:-

> "5. Sections 138 and 139 of the Negotiable Instruments Act are set out herein below for convenience:
>
> ***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 provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or

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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.

6. The object of Section 138 of the Negotiable Instruments Act is to infuse credibility to negotiable instruments including cheques and to encourage and promote the use of negotiable instruments including cheques in financial transactions. The penal provision of Section 138 of the Negotiable Instruments Act is intended to be a deterrent to callous issuance of negotiable instruments such as cheques without serious intention to honour the promise implicit in the issuance of the same.

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18. In passing the impugned judgment and order dated 21-11-2017, the High Court mis-construed Section 139 of Negotiable Instruments Act, which mandates that unless the contrary is proved, it is to be presumed 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. Needless to mention that the presumption contemplated Under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the Accused drawer of the cheque.

19. In Hiten P. Dalal v. Bratindranath Banerjee: (2001) 6 SCC 16, this Court held that both Section 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. Following the judgment of this Court in State of Madras v. Vaidyanatha Iyer :AIR 1958 SC 61, this Court held that it was obligatory on the Court to raise this presumption.

20. Section 139 introduces an exception to the general Rule as to the burden of proof and shifts the onus on the Accused. The presumption Under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are Rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution 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 and presumptions of fact unless the Accused adduces

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evidence showing the reasonable possibility of the non-existence of the presumed fact as held in Hiten P. Dalal (supra).

21. Presumption of innocence is undoubtedly a human right as contended on behalf of the Respondent-Accused, relying on the judgments of this Court in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr. : (2005) 5 SCC 294 and Rajesh Ranjan Yada @ Pappu Yadav v. CBI through its Director : (2007) 1 SCC 70. However the guilt may be established by recourse to presumptions in law and presumptions in facts, as observed above.

22. In Laxmi Dyechem v. State of Gujarat and Ors. : (2012) 13 SCC 375, this Court reiterated that in view of Section 139, it has to be presumed that a cheque was issued in discharge of a debt or other liability but the presumption could be rebutted by adducing evidence. The burden of proof was however on the person who wanted to rebut the presumption. This Court held "however, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act".

23. In Kumar Exports v. Sharma Carpets : (2009) 2 SCC 513, this Court reiterated that there is a presumption that every negotiable instrument duly executed, is for discharge of a debt or liability, but the presumption is rebuttable by proving the contrary. In the facts and circumstances of the case it was found that the cheque in question was towards advance for purchase of carpets, which were in fact not sold by the payee of the cheque to the drawer, as proved from the deposition of an official of the Sales Tax Department, who stated that the payee had admitted that he had not sold the carpets.

24. In K.N. Beena v. Muniyappan and Anr. : (2001) 8 SCC 458, this Court held that in view of the provisions of Section 139 of the Negotiable

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Instruments Act read with Section 118 thereof, the Court had to presume that the cheque had been issued for discharging a debt or liability. The said presumption was rebuttable and could be rebutted by the Accused by proving the contrary. But mere denial or rebuttal by the Accused was not enough. The Accused had to prove by cogent evidence that there was no debt or liability. This Court clearly held that the High Court had erroneously set aside the conviction, by proceeding on the basis that denials/averments in the reply of the Accused were sufficient to shift the burden of proof on the complainant to prove that the cheque had been issued for discharge of a debt or a liability. This was an entirely erroneous approach. The Accused had to prove in the trial by leading cogent evidence that there was no debt or liability.

25. In R. Vijayan v. Baby and Anr. : (2012) 1 SCC 260 this Court observed that the object of Chapter XVII of the Negotiable Instruments Act is both punitive as also compensatory and restitutive. It provides a single forum and single proceeding for enforcement of criminal liability by reason of dishonour of cheque and for enforcement of the civil liability for realization of the cheque amount, thereby obviating the need for the creditor to move two different fora for relief. This Court expressed its anguish that some Magistrates went by the traditional view, that the criminal proceedings were for imposing punishment and did not exercise discretion to direct payment of compensation, causing considerable difficulty to the complainant, as invariably the limitation for fling civil cases would expire by the time the criminal case was decided.

26. In R. Vijayan v. Baby and Anr. (supra) this Court observed that unless there were special circumstances, in all cases of conviction, the Court should uniformly exercise the power to levy fine up to twice the cheque amount and keeping in view the cheque amount and the

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simple interest thereon at 9% per annum as the reasonable quantum of loss, direct payment of such amount as compensation. This Court rightly observed that uniformity and consistency in deciding similar cases by different courts not only increases the credibility of the cheque as a Negotiable Instrument but also the credibility of the Courts of Justice.

27. The judgment of this Court in Raj Kumar Khurana v. State of (NCT of Delhi) and Anr. : (2009) 6 SCC 72 was rendered in the particular facts of the case where the drawer of the cheque had reported to the police and the bank that two unfilled cheques signed by him had been stolen.

28. The proposition as re-enunciated in John K John v. Tom Varghese and Anr. (2008) 4 SCC 54 cited on behalf of the Respondent-Accused that if two views are possible, this Court, in exercise of its jurisdiction Under Article 136 of the Constitution would ordinarily not interfere with a judgment of acquittal, is well settled. In the aforesaid case this Court affirmed an acquittal Under Section 138 of the Negotiable Instrument Act, in the peculiar facts and circumstances of the case where several civil suits between the parties were pending.

29. In Krishna Janardhan Bhat v. Dattatraya G. Hegde : (2008) 4 SCC 54, cited on behalf of the Respondent-Accused, this Court reaffirmed that Section 139 of the Act raises a presumption that a cheque duly drawn was towards a debt or liability. However, keeping in view the peculiar facts and circumstances of the case, this Court was of the opinion that the courts below had approached the case from a wholly different angle by wrong application of legal principles.

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32. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption Under Section 139 that the cheque has been issued in discharge of a debt or liability is on the Accused and the fact

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> that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.
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> 33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.
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> 34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the Accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

18. In ***Rangappa v. Mohan: AIR 2010 SC 1898,*** it has been held as follows:-

> "14. 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 (supra) 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

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can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

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 accused/defendant cannot be expected to discharge an unduly high standard or proof.

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.

15. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss

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of a blank cheque was taken up belatedly and the accused had mentioned a different date in the `stop payment' instructions to his bank. Furthermore, the instructions to `stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.

19. In ***MSR Leathers v. S. Palaniappan: (2013) 1 SCC 177***, it has been held as follows:-

10. The Proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied

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before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make 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. The third condition is that the drawer of such a cheque should have failed to make 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. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque

20. In ***Harihara Krishnan v. J. Thomas: (2018) 13 SCC 663***, it has been held as follows:-

> "26. The scheme of the prosecution in punishing Under Section 138 of THE ACT is different from the scheme of the Code of Criminal Procedure. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence Under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him

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> with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence Under Section 138 is that inspite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

21. Now coming to the order impugned, it is evident that learned lower court at para-8 has stated that cheque is filled up in different pen, one of the grounds of acquittal is found duly covered under ***Bir Singh v. Mukesh Kumar (supra)***. Learned lower court at para-8 has stated that the complainant has failed to substantiate with regard to possession of such huge amount and further, mode of payment is also not a relevant factor for consideration as decided by the Hon'ble Apex Court in the case

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of ***Kishan Rao v. Shankargouda (supra)***.

22. Apart from this, as is evident, the respondent no.2/accused never challenged nor controverted that the aforesaid leaflet cheques were not issued in his favour by the bank. When there happens to be no denial with regard thereto, then in that event, how it has gone under custody of complainant/appellant would have also been explained much less, at least, speaking about theft of the cheques and in likewise manner, there would have been some sort of positive activity at his end in accordance with Section 139 of the NI Act.

23. Now coming to the evidence, it is needless to say that only three PWs have been examined. PW-1, during course of examination-in-chief has stated that as the cheque issued by the accused has bounced which was issued in lieu of satisfaction of the borrowed amount appertaining to Rs. 23,76,000/-, this case has been filed. During course of cross-examination, he has stated at para-3 that money was paid through cheque. In para-4, he has stated that cheque was bounced. Cheque was issued on 11.07.2014 of Punjab National Bank. In para-5, he has stated that through complainant he came to know with regard to dishonour of the cheque. He has further stated that the accused has put his signature in his presence. Then thereafter at para-7,

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he has stated that money was taken as a lone on the pretext of getting it returned within 3-4 months. Procured money through cash as well as cheque. In para-8, he has stated that he is not remembering the cheque number issued by Deepak. In para-9, he has stated that he is not remembering the date of RTGS. In para-17, he has stated that no document was prepared with regard thereto. In para 20, he has stated that money was paid through bank. Then had denied the suggestion that the complainant is in the habit of launching false case. In para-23, he has stated that Deepak has not filed Civil suit under Specific Performance of Contract Act. Then has denied the suggestion that being friend of the complainant, he has deposed falsely.

24. PW-2 during examination-in-chief reiterated the version. During cross-examination he has stated at para-5 that the occurrence took place in his presence on account thereof, he has deposed. In para-7, he has stated that actual date of payment, he is not remembering but it was the month of April 2013. In para-10, he has stated that Deepak had informed regarding non payment of the money. In para-12, he has stated that the cheque was handed over in his presence. He has seen the cheque but he is unable to say on which date it was deposited in the bank. Again at para-21, he has denied the

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suggestion that being friend of Deepak, this case has been filed.

25. PW-3 is informant himself and has deposed that in the background of friendship with the accused, Anil came to him and demanded Rs. 24 Lacs on 15.04.2013 whereupon he paid Rs. 23,76,000/- after collecting it from his account as well as from his other friends. Rs. 18 Lacs was paid through the cheque, RTGS and Rs. 7, 37,000/- was paid through cash. The aforesaid payment was made at an assurance that it will be repaid back within four months. When the time expired, repayment was not done, then he advanced demand whereupon, on 11.07.2014, he/accused handed over two cheques of Punjab National Bank at his residence. Cheque was filled up by Anil Kumar Gupta himself. Signature was put by him. Name Deepak Kumar was written by him. Accepted the same. He has deposited both the cheques in his account lying at Axis Bank, Danapur. On 15.07.2014, the bank informed regarding dishonour of both the cheques on account of mismatching of the signature. Thereafter, he has served notice on 23.07.2014 (Exhibited) under registered post (Exhibited). Also exhibited the complaint petition. During cross-examination at para-3, he has stated that on 15.07.2014, cheque was bounced, while notice was served on 24.07.2013 (might have been mistake over year),

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as from Ext-3, it happens to be 24.07.2014. In para-4, there happens to be disclosure that on account of non payment of money as well as taking dilly-dallying tactics, complaint has been filed. In para-6, he has stated that money was paid on 15.04.2013. In para-9, he has stated that signature over cheque was made in his presence. He has deposited the cheque on 11.07.2014 and on 15.07.2014 he was informed by the Bank regarding dishonour on account of mismatching of specimen signature. In para-13, he has stated that he has served notice on 23.07.2014 but no reply was given. In para-14, he has stated that he has not mentioned any reason with regard to non-reply of the notice. In para-17, he has stated that date was given over the cheque on 11.07.2014 and on that date itself cheque was deposited for encashment. The has denied the suggestion that in order to malign the prestige of the accused, after creating his forged signature, this case has been instituted. It has further been suggested that accused had not issued any cheque.

26. So, from the evidence aforesaid, it is apparent that nothing substantial has been at the end of respondent no.2 much less challenging over as to how account number was mentioned in the cheque whether aforesaid account number does not belong to leaflet aforesaid, whether cheque number was not

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issued in his favour by the concerned bank and at least, while discharging the presumption by way of rebuttal, those things would have been there. It is further evident that the learned lower court on its own recorded without having specific assertion under the statement under Section 313 CrPC or during course of cross-examination, the witnesses have been suggested that Respondent No.2/accused had issued two cheques in lieu of part performance of negotiation over sale/purchase of the land and that being so, the finding of the learned lower court happens to be perverse, cryptic.

27. Consequent thereupon, the same is set aside. Appeal is allowed. Accordingly, Respondent No.2/accused is held guilty for an offence punishable under Section 138 of the N.I. Act, whereupon is sentenced to undergo RI for one year as well as fined twice of the amount of both the cheque. In default thereof, to undergo RI for three months. In case of deposit of fine amount, half will be given to the appellant/complainant. Respondent no.2 is directed to surrender before the lower court within fortnight to serve out the sentence.

perwez **(Aditya Kumar Trivedi, J)**

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