THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 5th March, 2020

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.33 of 2018

Appellant : Sancha Bahadur Subba

versus

Respondent : Ramesh Sharma

Appeal under Section 378(4) of the Code of Criminal Procedure, 1973

Appearance

Mr. Umesh Ranpal with Mr. Raghvendra Kumar and Ms. Sanju Gupta, Advocates for the Appellant.

Mr. S.S. Hamal with Mr. Leada T. Bhutia, Ms. Sabina Chettri and Ms. Saroja Chettri, Advocates for the Respondent.

Crl.A. No.34 of 2018

Appellant : Sancha Bahadur Subba

versus

Respondent : Ramesh Sharma

Appeal under Section 378(4) of the Code of Criminal Procedure, 1973

Appearance

Mr. Umesh Ranpal with Mr. Raghvendra Kumar and Ms. Sanju Gupta, Advocates for the Appellant.

Mr. S.S. Hamal with Mr. Leada T. Bhutia, Ms. Sabina Chettri and Ms. Saroja Chettri, Advocates for the Respondent.

Crl.A. No.35 of 2018

Appellant : Sancha Bahadur Subba

versus

Respondent : Ramesh Sharma

Appeal under Section 378(4) of the Code of Criminal Procedure, 1973

Appearance

Mr. Umesh Ranpal with Mr. Raghvendra Kumar and Ms. Sanju Gupta, Advocates for the Appellant.

Mr. S.S. Hamal with Mr. Leada T. Bhutia, Ms. Sabina Chettri and Ms. Saroja Chettri, Advocates for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This common Judgment disposes of three Criminal Appeals i.e. Criminal Appeal No.33 of 2018 *(arising out of Private Complaint Case No.14 of 2015)*, Criminal Appeal No.34 of 2018 *(arising out of Private Complaint Case No.31 of 2015)* and Criminal Appeal No.35 of 2018 *(arising out of Private Complaint Case No.30 of 2015)*.

2. The Appeals assail the acquittal of the Respondent *(the accused person before the learned trial Court)* by the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short "N.I. Act"), vide Judgments dated 11.05.2018, in the afore detailed Private Complaint Cases. The grounds for acquittal were that the Appellant had failed to prove the ingredients of "giving Notice" as required under Section 138 of the N.I. Act. The Appellant failed to establish beyond a reasonable doubt that a debt or any other liability existed in his favour. That the presumption under Section 139 of the N.I. Act was successfully rebutted by the Respondent. Hence, the Appeals.

3. The facts common in all the Complaints, leading to the Appeals may briefly be adverted to. The Appellant required

finances for his son's incomplete hotel project at Gangtok, Sikkim. The Respondent in the month of March, 2013 offered to assist him to obtain loan of Rupees five crores for the said purpose from Syndicate Finance Private Limited, Mumbai. The condition for obtaining such loan was an advance payment of 2% of the capital applied for, as processing fees. The Appellant agreed to the said proposal and thereafter made over a sum of Rs.12,70,000/- (Rupees twelve lakhs and seventy thousand) only, to the Respondent in March, 2013 in two tranches of Rs.10,00,000/- (Rupees ten lakhs) only, and Rs.2,70,000/- (Rupees two lakhs and seventy thousand) only, for the aforementioned purpose. Later, on doubts emerging about the credentials of the Finance Company, the Appellant instructed the Respondent not to deposit the said amounts with the Company. The Respondent however informed him that the deposit was already made, nevertheless, the amount would be refunded by the month of July, 2013. In August, 2013 in order to obtain loan for the same purpose from ICCI, Kolkata a sum of Rs.30,00,000/- (Rupees thirty lakhs) only, was again handed over by the Appellant to the Respondent as Promoters Capital contribution. The total amount thus advanced to the Respondent by the Appellant was a sum of Rs.42,70,000/- (Rupees forty two lakhs and seventy thousand) only. When no loans were forthcoming, the Appellant demanded a refund from the Respondent in April, 2014, who promised to repay the entire amount by 31.05.2014, in vain. Following these events, on 07.11.2014 the Respondent executed a written Agreement (Exhibit 1), acknowledging therein receipt of Rs.42,70,000/-

(Rupees forty two lakhs and seventy thousand) only, from the Appellant in different tranches. He undertook to repay the entire amount towards which he issued three post dated Cheques bearing different dates. The Cheques came to be dishonoured on various grounds when presented to the Bank for payment by the Appellant on 31.12.2014, 07.04.2015 and 17.02.2015 respectively but the Respondent neglected to repay the amount to the Appellant. The Appellant in the meanwhile lodged a Complaint against the Respondent at the Sadar Police Station, Gangtok on 05.01.2015 (Exhibit 8) for cheating and criminal breach of trust. Pursuant thereto the Appellant issued Legal Notices to the Respondent under Section 138 of the N.I. Act as follows;

> *(a)* Legal Notice on 13.01.2015 *(received by Dharni Sharma, brother of the Respondent)*, informing the Respondent that the Cheque bearing No.031570 drawn on IDBI Bank, Gangtok Branch, dated 30.12.2014 amounting to Rs.10,00,000/- (Rupees ten lakhs) only, issued by the Respondent had been deposited by the Appellant in the Central Bank of India, Gangtok Branch with due notice to the Respondent. The Cheque was dishonoured vide its return memo dated 31.12.2014 with the remarks "Funds insufficient" *(Criminal Appeal No.33 of 2018,*

arising out of Private Complaint Case No.14 of 2015, for short "P.C. Case").

(b) Legal Notice on 05.05.2015, *(received by Pashupathi Sharma, father of the Respondent)*, informing the Respondent that the Cheque bearing No.002215 drawn on AXIS Bank, Gangtok Branch, dated 31.05.2015 amounting to Rs.21,70,000/- (Rupees twenty one lakhs and seventy thousand) only, issued by the Respondent had been deposited by the Appellant in the Central Bank of India, Gangtok Branch with due notice to the Respondent. The Cheque was dishonoured vide its return memo dated 07.04.2015 with the remarks "Account closed" *(Criminal Appeal No.34 of 2018 arising out of P.C. Case No.31 of 2015)*.

(c) Legal Notice on 16.03.2015, *(received by Dharni Sharma, brother of the Respondent)*, informing the Respondent that the Cheque bearing No.002217 drawn on AXIS Bank, Gangtok Branch, dated 15.02.2015 amounting to Rs.11,00,000/- (Rupees eleven lakhs) only, issued by the Respondent had been deposited by the Appellant in the Central Bank of India, Gangtok Branch with due notice to the

Respondent. The Cheque was dishonoured vide its return memo dated 17.02.2015 with the remarks "Funds insufficient" *(Criminal Appeal No.35 of 2018 arising out of P.C. Case No.30 of 2015)*.

Hence, the prayers in the Appeals.

4. After the Complaints were lodged under Section 138 of the N.I. Act before the learned trial Court in the three Private Complaints *supra,* cognizance was taken and substance of accusation for the offence under Section 138 of the N.I. Act in each of the Complaints was explained to the Respondent to which he pleaded "not guilty." The Appellant examined himself and four other witnesses. The Respondent was examined under Section 313 Cr.P.C. and was a witness for himself thereafter, but failed to produce two other witnesses that he had earlier sought to examine in his defence. On consideration of all materials and evidence the impugned Judgments of the learned trial Court was pronounced.

5.(a) While reiterating the facts as put forth hereinabove, it was urged by learned Counsel for the Appellant that despite the proof that the Legal Notices addressed to the Respondent in his permanent address, as indicated in Exhibit 1, had been received by his brother as reflected in P.C. Case No.14 of 2015 and P.C. Case No.30 of 2015 and by his father in P.C. Case No.31 of 2015, the learned trial Court overlooked the provisions of Section 27 of the General Clauses Act, 1897 and held that the ingredients of "giving Notice" were unfulfilled as it was not sent to the Respondent's Gangtok address as he no longer resided in

"Linkey." The learned trial Court thus failed to appreciate that the address furnished in Exhibit 1, executed by the Respondent on 07.11.2014 was of "Linkey" and therefore he had made a false statement before the Court. To fortify this submission reliance was placed on ***Bhagwati Kumar Gupta v. State of Rajasthan and Another***[1]. Besides, he has not denied that Dharni Sharma is his brother and Pashupathi Sharma his father, both of whom he failed to produce as witnesses to substantiate his denial of their signatures appearing on the Acknowledgment Cards.

(b) In the next leg of his argument, learned Counsel advanced the contention that the learned trial Court concluded that neither debt nor legal liability subsisted against the Respondent, who it opined, was evidently pressurized to enter into the Agreement, Exhibit 1, as witnesses to the execution of the document were known to the Appellant but no witnesses were present from the side of the Respondent. This, despite the Respondent's admission that his guardian Durga Prasad Sharma was present. The learned trial Court also opined that Exhibit R1 the General Diary extract of the Crime Branch, Crime Investigation Department, dated 18.09.2014 revealed that the Appellant had complained to the Crime Investigation Department regarding non-refund of his money amounting to Rs.45,00,000/- (Rupees forty five lakhs) only, by the Respondent, prior in time to issuance of the Cheques and hence assumed that the Respondent was coerced to execute Exhibit 1. The learned trial Court next ventured into discussing the merits of Exhibit 1, the contents of which stood admitted by the Respondent, therefore,

[1] 2013 (2) RLW 1788 (Raj.)

the conclusion of the learned trial Court that the contents cannot be relied for "speaking of the actual facts" is untenable. The learned trial Court also raised doubts about the place where Exhibit 1 was signed *viz.* the Chambers of the Advocate and further opined that the Appellant had failed to prove that the Cheques had been dishonoured, whereas the documents relied on by the Appellant marked Exhibit 4 in all the Complaints, clearly indicate the rejection of the Cheques. The Respondent did not deny issuance of the Cheques.

(c) That, the learned trial Court reached a finding that the presumption against the Respondent was duly rebutted by him as required under Section 139 of the N.I. Act, when in fact none existed. On this count, reliance was placed on ***Uttam Ram v. Devinder Singh Hudan and Another***[2] and ***Purna Kumar Gurung v. Ankit Sarda***[3]. Hence, the impugned Judgments of the learned trial Court deserve to be set aside.

6.(a) Repudiating the arguments of learned Counsel for the Appellant, it was contended by learned Counsel for the Respondent that the records reveal that no Notice was issued to the Respondent in his address at "Bypass Road, Gangtok," despite the Appellant being aware that the Respondent resided there. That, no averment was made in the Complaints that the Notices were sent to the correct address of the drawer and hence there can be no assumption of service when the Respondent has denied receipt of Notices. That in ***M.D. Thomas v.***

[2] (2019) 10 SCC 287
[3] MANU/SI/0060/2018

P.S. Jaleel and Ors.[4] the Hon'ble Supreme Court has unequivocally laid down that Notice must be served on the accused and not on a third person. That, there is no fixed rule that whenever Notice cannot be served due to non-availability of addressee Court would presume service of the Notice. The Appellant failed to summon the Respondent's father and brother or the Postman to establish service of Notices which is therefore unproved. Support was garnered from the decision in ***D. Vinod Shivappa v. Nanda Belliappa***[5].

(b) It was next contended that the Appellant failed to establish that the Cheques were returned dishonoured. The Cheque Return Memos filed before the learned trial Court were photocopies and never a part of the documentary evidence furnished, thereby failing to establish the third ingredient of the offence. That, the Appellant is a Government servant but the source from where he obtained Rs.42,00,000/- (Rupees forty two lakhs) only, has not been disclosed. Therefore the unaccounted cash amount is not a legally enforceable liability or a legally recoverable debt and Exhibit 1 does not substantiate the Appellant's case. To buttress this submission reliance was placed on ***Sanjay Mishra v. Kanishka Kapoor alias Nikki and Another***[6] and ***Basalingappa v. Mudibasappa***[7].

(c) That, so far as rebuttal of presumption is concerned, the standard of proof to be discharged by the accused is not "beyond a reasonable doubt" but only to the extent of

[4] (2009) 14 SCC 398
[5] (2006) 6 SCC 456
[6] 2009 Cri.LJ 3777
[7] AIR 2019 SC 1983

preponderance of probability. In this context reliance was also placed on ***Krishna Janardhan Bhat v. Dattatraya G. Hegde***[8] and ***Rangappa v. Sri Mohan***[9]. That, in the facts and circumstances as placed before this Court the impugned Judgments of the learned trial Court warrant no interference and the Appeals be dismissed.

7. I have heard the rival submissions put forth by Learned Counsel at length and given due and anxious consideration to the same. I have also carefully perused the records of the case including the evidence, impugned Judgments and the citations made at the Bar.

8. The questions germane to the decision of the Appeals are;

(i) Whether the learned trial Court was in error in concluding that the Appellant failed to prove the ingredients of "giving notice" as required under Section 138 of the N.I. Act?

(ii) Whether the Appellant failed to establish beyond a reasonable doubt that the Respondent had to discharge a debt or a legal liability?

(iii) Whether the Respondent was able to rebut the presumption in terms of Section 139 of the N.I. Act?

9. In the first instance it would be relevant to notice the ingredients that make out an offence under Section 138 of the N.I. Act which are as follows;

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to

[8] (2002) 2 SCC (Cri) 166
[9] 2010 Cri.LJ 2871

another person from out of that account for the discharge of any debt or other liability.

(ii) that 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.

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that the cheque amount exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque 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;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

The penalty for a dishonoured Cheque is conviction for the drawer if the demand is not met within fifteen days of the receipt of Notice. Needless to add if payment ensues within the statutory period the legal liability under Section 138 of the N.I. Act ceases.

10. To address the first question flagged *supra* it is evident that Proviso *(b)* of Section 138 of the N.I. Act specifies;

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account**. - ……
>
> (a)……
>
> (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
>
> ……"

In this context it is relevant to discuss what "giving a notice in writing" tantamounts to. From the provisions of Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1872 (for short "Evidence Act") it manifests that once Notice is served by registered post by correctly addressing it to the drawer of the Cheque, the service of Notice is deemed to have been effected. In such a circumstance the requirements of Proviso *(b)* of Section 138 of the N.I. Act stands complied if the Notice is served in the manner prescribed therein. The object of these provisions are to ensure that unscrupulous drawers of Cheques are unable to avoid service of the statutory Notice by leaving their homes for sometime, and thereby evade prosecution. In this thread, we may usefully refer to the Judgment in ***K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr.***[10] wherein it was held as follows;

> "**20**. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.
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> **21**. **In *Maxwell's Interpretation of Statutes*, the learned author has emphasised that 'provisions relating to giving of notice often receive liberal interpretation'** …… The words in Clause (*b*) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to 'make a demand' by

[10] (1999) 7 SCC 510

> giving notice. The thrust in the clause is on the need to 'make a demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is dispatched his part is over and the next depends on what the sendee does.
>
> ……
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> **24**. No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice."
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> **(emphasis supplied)**

11. Reiterating the observation *supra* the Hon'ble Supreme Court in ***C.C. Alavi Haji v. Palapetty Muhammed and Ors.***[11] held as under;

> "**8**. ……It was observed that though Section 138 of the Act does not require that the notice should be given only by "post", yet in a case where the sender has dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 (for short 'the G.C. Act') could profitably be imported in such a case. It was held that in this situation service of notice is deemed to have been effected on the sendee unless he proves that it was not really served and that he was not responsible for such non-service."

In ***N. Parameswaran Unni v. G. Kannan and Another***[12] the Hon'ble Supreme Court held as follows;

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[11] (2007) 6 SCC 555

> "**15**. This Court in a catena of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", **due service has to be presumed**. Though in the process of interpretation right of an honest lender cannot be defeated as has happened in this case. ..."
>
> **(emphasis supplied)**

12. The decisions *supra* clear the air on the stand of the Hon'ble Supreme Court with regard to service of Notice. It is now essential to consider the Notices issued in the instant matters. The Legal Notice in each Complaint has been marked as Exhibit 5, the Postal Receipt as Exhibit 6 and the Acknowledgment Card as Exhibit 7 respectively. In P.C. Case No.14 of 2015 and P.C. Case No.31 of 2015 the Notices allegedly were received by Dharni Sharma, while in P.C. Case No.30 of 2015 the Notice allegedly was received by Pashupathi Sharma. The Respondent has not disputed that Dharni Sharma is his younger brother and Pashupathi Sharma is his father or that they were residents of "Linkey." While carefully walking through the evidence of the Respondent he asserts that he was not residing in "Linkey," Pakyong, East Sikkim from 2012-13 and that his father resides there. That, he is now residing in Gangtok due to his business and thereby had no knowledge of the alleged Legal Notices sent by the Advocate of the Appellant. He also denied the signatures of his brother and father on the Acknowledgment Cards, Exhibit 7. However a bare perusal of Exhibit 1, the Agreement, admittedly executed between the Respondent and the Appellant on 07.11.2014, reveals the address of the Respondent as

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[12] AIR 2017 SC 1681

"Linkey, P.O. & P.S. Pakyong, East Sikkim." The circumstances elucidated hereinabove pertaining to his non residence at "Linkey" but furnishing the address of "Linkey" in Exhibit 1 controvert each other and therefore makes the evidence of the Respondent unreliable. The Respondent failed to produce his kin *supra* to establish that the signatures appearing on the Acknowledgment Cards, Exhibit 7, were not their signatures respectively despite his denials.

13. The learned trial Court relied on the ratio of ***M.D. Thomas*** *(supra)* wherein it was held that service of Notice to the wife of the accused is not sufficient compliance with the requirement of "giving Notice" in terms of proviso *(b)* to Section 138 of the N.I. Act. The ratio in ***M.D. Thomas*** *(supra)* of a two Judge Bench of the Hon'ble Supreme Court, it may respectfully be stated is *per incuriam* in view of a prior decision of a three Judge Bench in ***C.C. Alavi Haji*** *(supra)* on the same aspect. It is apposite to state that while discussing *per incuriam* the Hon'ble Supreme Court in ***Government of A.P. and Another v. B. Satyanarayana Rao (dead) by Legal Representatives and Others***[13] held as follows;

> "The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

In ***Central Board of Dawoodi Bohra Community v. State of Maharashtra***[14] the Hon'ble Supreme Court has observed that the law laid down by it in a decision delivered by a Bench of larger

[13] (2000) 4 SCC 262
[14] (2005) 2 SCC 673

strength is binding on any subsequent Bench of lesser or coequal strength. In light of the above rulings it is clear that this Court is required to follow the ratio in ***C.C. Alavi Haji*** *(supra).* Hence, the decision in ***C.C. Alavi Haji*** *(supra)* and ***K. Bhaskaran*** *(supra)* of which the relevant portion is already extracted *supra,* would be applicable to the facts of the instant Appeals. No deficiency emanates on the part of the Appellant for having issued Notices to the Respondent in his admitted address and it therefore concludes that the Notices having been sent to the Respondent's correct address were duly served, fulfilling the requirement of "giving Notice," contrary to the finding of the learned trial Court.

14. Now to address the second question hereinabove. The learned trial Court held that no proof of a legal liability of the Respondent towards the Appellant existed as no Money Receipts were tendered in evidence to establish transactions between the Appellant and the Respondent. That although the Appellant deposed during cross-examination that money was taken by him from one Lalit Agarwal, Prem Chand Sharma and Sheetal Pradhan, he failed to examine them as witnesses. That, it was unbelievable that the Appellant would hand over money for obtaining loan without considering its mode of repayment and all other allied consequential terms of liabilities or conditions. The learned trial Court was impressed by the evidence of the Respondent that Exhibit 1 was prepared by him under coercion.

15. The contents of Exhibit 1 are explicit acceptance of liability by the Respondent. Although the learned trial Court was of the opinion that coercion was evident on account of absence

of independent witnesses from the side of the Respondent, to the contrary it is in the Respondent's evidence that one Durga Prasad Sharma his guardian was present with him. No proof whatsoever to establish coercion has been furnished. Why he did not make Durga Prasad Sharma sign on the document is not relevant for the present purposes, at the same time it is worth noticing that he has not deposed that Durga Prasad Sharma was restrained by the Appellant from signing on the document. The document was executed before an Oath Commissioner and all other allegations to the contrary have remained unproved. This Court in ***Purna Kumar Gurung*** *(supra)* while considering "debt" and "liability" held as follows;

> "**10**. ……
>
> Towards this, we may briefly examine what "debt" and "liability" entails. The term "debt" according to Black's Law Dictionary, 10th edition, is;
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> "Liability on a claim; a specific sum of money due by agreement or otherwise."
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> The explanation to Section 138 of the NI Act clarifies that the term "debt" referred to in the Section means "legal debt", that is one which is recoverable in a Court of law, e.g. as debt on a bill of exchange, a bond or a simple contract. On the other hand, the term "liability" as per Black's Law Dictionary, 10th edition is;
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> "The quality, state or condition of being legally obligated or accountable."
>
> "Liability" otherwise has also been defined to mean all character of debts and obligations, an obligation one is bound in law and justice to perform; an obligation which may or may not ripen into a debt, any kind of debt or liability, either absolute or contingent, express or implied.

16. Section 138 of the N.I. Act speaks of "any debt or other liability." The explanation to Section 138 lays down as follows;

> "*Explanation*.–For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

It has to be spelt out herein that every debt is a liability but not every liability is a debt, however both are required to be legally enforceable. In view of the contents in Exhibit 1 there is a clear admission by the Respondent of his liability to repay the amounts mentioned in the document. There is no escaping the fact that it was a legally enforceable liability. The issuance of three post dated Cheques by the Respondent further endorses this circumstance. The argument of learned Counsel for the Respondent that the Appellant is a Government servant hence the source from where he afforded Rs.42,00,000/- (Rupees forty two lakhs) only, has not been indicated was never raised in the evidence of the Respondent and for the first time finds place only in Appeal. The Judgment of the Hon'ble Bombay High Court in ***Sanjay Mishra*** *(supra)* relied on by the Respondent is overruled by the ratio of the Hon'ble Supreme Court in ***Rohitbhai Jivanlal Patel v. State of Gujarat and Others***[15] wherein it was *inter alia* held as follows;

> "**17**. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, **the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach**

[15] MANU/SC/0393/2019

> **of the Trial Court had been at variance with the principles of presumption in law**. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-Appellant. The aspect relevant for consideration had been as to whether the accused-Appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence."
>
> **(emphasis supplied)**

17. The circumstances in the instant cases also can be distinguished from the ratio in ***Basalingappa*** *(supra)* wherein the Hon'ble Supreme Court held as follows;

> "**30**. We are of the view that when evidence was led before the court to indicate that apart from loan of Rs 6 lakhs given to the accused, within 2 years, amount of Rs 18 lakhs have been given out by the complainant and his financial capacity being questioned, it was incumbent on the complainant to have explained his financial capacity. Court cannot insist on a person to lead negative evidence. **The observation of the High Court that trial court's finding that the complainant failed to prove his financial capacity of lending money is perverse, cannot be supported**. **We fail to see that how the trial court's findings can be termed as perverse by the High Court when it was based on consideration of the evidence, which was led on behalf of the defence**."
>
> **(emphasis supplied)**

In the above ratio it is clear that evidence was led before the Court pertaining to the financial capacity of the Appellant thereby extending him an opportunity to meet the evidence by way of cross-examination, or furnishing of witnesses. In the cases at hand, this is an altogether new point raised at the time of Appeal. The Respondent had never questioned the financial

capacity of the Appellant during trial and cannot bring out a new point at the appellate stage.

18. That having been said while considering the third question formulated hereinabove, it is apposite to first discuss what Section 139 of the N.I. Act envisages. This Section is extracted hereinbelow for easy reference;

> "**139. Presumption in favor 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, or any debt or other liability."

This Section is essentially to be read with Section 118 of the N.I. Act, the relevant portion is extracted hereinbelow;

> "**118. Presumptions as to negotiable instruments**.-Until the contrary is proved, the following presumption 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;"

It emerges from a reading of the said provisions that the presumption under Section 139 of the N.I. Act is an extension of the presumption of Section 118(a) of the Act. If the negotiable instrument happens to be a Cheque, Section 139 raises a further presumption that the holder of the Cheque received the Cheque in discharge in whole or in part of any debt or other liability. Section 118 of the N.I. Act uses the phrase "until the contrary is proved," Section 139 of the N.I. Act provides "unless the contrary is proved." Section 4 of the Evidence Act which defines "may presume" and "shall presume" makes it clear that presumptions to be raised under the aforestated provisions are

rebuttable. In ***Hiten P. Dalal v. Bratindranath Banerjee***[16] while discussing rebuttable presumption, the Hon'ble Supreme Court held as follows;

> "**20**. That the four cheques were executed by the appellant in favour of Standard Chartered Bank (hereinafter referred to as "the Bank") has not been denied nor was it in dispute that the cheques were dishonoured because of insufficient funds in the appellant's account with the drawee viz. Andhra Bank. Because of the admitted execution of the four cheques by the appellant, the Bank was entitled to and did in fact rely upon three presumptions in support of its case, namely, under Sections 118, 138 and 139 of the Negotiable Instruments Act. Section 118 provides, inter alia, that until the contrary is proved it shall be presumed 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. The presumption which arises under Section 138 provides more specifically that where any cheque drawn by a person on an account for payment of any amount of money for the discharge in whole or in part of any debt or other liability, is returned by the drawee bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque, such person shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. The nature of the presumption under Section 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non-payment after receipt of notice by the drawer of the cheque. All three conditions have not been denied in this case.
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> ……
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> **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, as noted in State of Madras v. A. Vaidhyanatha Iyer *[AIR 1958 SC 61]* it is

[16] 2001 SCC (Cri) 960

> 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." *(Ibid. at p. 65, para 14)* 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 nonexistence of the presumed fact."

19. In ***Kamala S. v. Vidhyadharan M.J. and Another***[17], it was held as follows;

> "**16**. The nature and extent of such presumption came up for consideration before this Court in M.S. Narayana Menon Alias Mani v. State of Kerala and Anr. *[(2006) 6 SCC 39]* wherein it was held:
>
> > "30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

20. On the touchstone of the above ratios and examination of the contents of Exhibit 1 it is evident that the Respondent has admitted his legal liability/ obligations towards

[17] (2007) 5 SCC 264

the Appellant for an amount of Rs.42,70,000/- (Rupees forty two lakhs and seventy thousand) only. The three post dated Cheques came to be issued consequent upon execution of Exhibit 1 thereby raising the presumption as elucidated in Sections 139 and 118 of the N.I. Act *supra.* The Respondent does not deny his signatures on the Cheques which were dishonoured nor does he dispute the transactions between him and the Appellant and has accepted the execution of Exhibit 1. Section 139 of the N.I. Act is an example of reverse onus and therefore once an admission of issuance of Cheque emanates from the Respondent and the signatures on the Cheques are admitted, there is always a presumption in favour of the Complainant that a legally enforceable debt or liability exists. It is for the Respondent to rebut such presumption in evidence, which he has failed to do.

21. The argument of learned Counsel for the Respondent concerning non-filing of documentary evidence in the Complaints to establish that the Cheques were dishonoured has no legs to stand. It emanates with clarity that Exhibit 4, a certified copy of the Cheque Return Memo in P.C. Case No.14 of 2015 established that the Cheque was dishonoured. Neither the evidence nor the Orders of the learned trial Court, (dated 22.02.2017) reveal that any objection was raised by the Respondent to Exhibit 4 being a certified copy in P.C. Case No.14 of 2015. Such an objection not having been raised at trial cannot now be heard at the appellate stage. In P.C. Case No.31 of 2015 and P.C. Case No.30 of 2015 Exhibit 4, in original, individually, were furnished as evidence by

the Appellant which established that the Cheques were dishonoured by the Bank on grounds given in the documents.

22. This Court is conscious and aware that interference against an acquittal recorded by the learned trial Court should be rare and in exceptional circumstances, however it is open to the High Court to reappraise the evidence and the conclusion drawn by the learned trial Court to consider whether the Judgment of the learned trial Court can be stated to be perverse. The word "perverse" has to be understood in law as defined to mean "against the weight of evidence." From the discussions that have ensued above I am of the considered opinion that the findings arrived at by the learned trial Court are perverse and erroneous.

23. Consequently, the Appeals are allowed.

24. The impugned Judgments are set aside.

25. The Respondent is convicted of the offence under Section 138 of the N.I. Act in each of the afore detailed Complaints.

26. He is sentenced to undergo Simple Imprisonment of three months each, under Section 138 of the N.I. Act in each of the Complaints. The Sentences shall run concurrently.

27. The Hon'ble Supreme Court in ***Meters and Instruments (P) Ltd. v. Kanchan Mehta***[18] *inter alia* held that;

> "18.4...apart from the sentence of imprisonment, the court has jurisdiction under Section 357(3) CrPC to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 CrPC."

[18] (2018) 1 SCC 560

On the anvil of the said Judgment it is hereby ordered that the Respondent shall also pay a total compensation amounting to Rs.42,70,000/- (Rupees forty two lakhs and seventy thousand) only, within three months from today to the Appellant, in terms of Section 357(3) of the Cr.P.C., with interest at the rate of 9% per annum on the above stated amount, from the date of filing of the Complaints before the learned trial Court. In default of payment of compensation he shall undergo Simple Imprisonment of two years. The compensation shall thereafter be recovered in terms of the provisions of Section 431 Cr.P.C.

28. The Respondent/Convict shall surrender before the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, within sixty days from today, to undergo his Sentence. Should there be failure on his part to surrender, the learned trial Court shall issue a Non-Bailable Warrant of Arrest against the Respondent/Convict and thereafter commit him to jail for serving the Sentence.

29. Copy of this Judgment be transmitted to the learned trial Court for information and compliance.

30. No order as to costs.

(Meenakshi Madan Rai)
Judge
05.03.2020

Approved for reporting : **Yes**

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