

**In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**C.R.A. No.424 of 2017
With
C.R.A. No.425 of 2017
With
C.R.A. No.426 of 2017
With
C.R.A. No. 427 of 2017
M/s Rajco Steel Enterprises
Vs.
Mrs. Kavita Saraff and another**

For the appellant in all the appeals	:	Mr. Debasish Roy, Mr. Arijit Bardhan, Mr. Mujibar Ali Naskar, Mr. Avik Ghatak, Mr. Amit Ranjan Pati
For the respondent no.1 in CRA No.424 of 2017	:	Mr. Sabyasachi Banerjee, Ms. Nahid Ahmed
For the respondent no.1 in CRA No.425-427 of 2017:	:	Ms. Minal Palane, Ms. Nahid Ahmed
For the State in all the appeals	:	Mr. Bidyut Kumar Ray, Ms. Rita Dutta
Hearing concluded on	:	09.10.2021
Judgment on	:	06.12.2021

Sabyasachi Bhattacharyya, J:-

1. The complainant, in a proceeding under Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as "the N.I. Act") has

filed the present appeal. *Vide* judgment and order dated June 29, 2016, the Magistrate held that the respondent-accused was guilty of committing an offence punishable under Section 138 of the N.I. Act and to convict her under Section 255(2) of the Code of Criminal Procedure (for short “the CRPC”), sentencing her to suffer simple imprisonment for six (06) months and directing her to pay to the complainant Rs.1,90,00,000/- as compensation under Section 357(3) of the CRPC within one (01) month from the date of the judgment and order; in default, the accused was to undergo a further term of simple imprisonment for one (01) year.

- 2.** The accused-respondent preferred an appeal against the said order of the magistrate. Ultimately, *vide* judgement and order dated May 18, 2017, the Additional District and Sessions Judge, 2nd Fast Track Court, Bichar Bhawan, Calcutta set aside the order of conviction dated June 29, 2016 and acquitted the accused-respondent.
- 3.** The present appeal has been preferred against the said judgment of acquittal.
- 4.** The four appeals are between the same parties and arise from similar orders as above, passed in respect of different cheques. C.R.A. No.424 of 2017 arises in respect of cheque no.713384 dated November 24, 2008 for an amount of Rs.1,75,00,000/- drawn on the Axis Bank Limited, Burrabazar Branch, Kolkata. C.R.A. No.425 of 2017 arises from cheque no.713382 dated November 17, 2008, C.R.A. No.426 of 2017 with cheque no.713378 dated November 7, 2008 and C.R.A.

427 of 2017 from cheque no.713380 dated November 12, 2008, all to the tune of Rs.2,00,00,000/- each, drawn on the same bank as in C.R.A. No.424 of 2017.

5. In view of the allegations and evidence being virtually the same in all the four cases, all the appeals are taken up for hearing and being decided together.
6. The complainant, M/s. Rajco Steel Enterprises, a Partnership Firm, allegedly granted financial assistance to the accused-respondent no.1, namely Kavita Saraff, through various banking transactions. According to the appellant, the accused issued the aforesaid cheques in part discharge of her liability. The cheques were signed by the respondent no.1 and presented for encashment by the complainant through HDFC Bank Limited, Dalhousie Branch at Kolkata, but were returned dishonoured for the reason "Funds Insufficient". The complainant Firm issued demand notice, which was duly received by the accused. However, the accused did not comply with the requisition, which compelled the appellant to initiate the proceeding under Section 138 of the N.I. Act. Learned counsel appearing for the appellant places reliance on the presumptions under Sections 118(a) of the 139 of the N.I. in the regard. Section 118(a) raises a rebuttable presumption 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 so done for consideration.

7. On the other hand, Section 139 of the N.I. Act gives rise to a presumption in favour of a holder of a cheque to the effect that the cheque has been issued for discharge of any debt or other liability.
8. The presumption under Section 139 is for the purpose of constituting an offence under Section 138 of the N.I. Act.
9. Learned counsel for the appellant argues that, unless the contrary is proved, the presumption raised under the aforesaid sections shall prevail and the burden of proving the contrary would lie upon the accused. In the event the accused disproves the existence of any legally recoverable debt or liability, the burden shifts on the complainant to prove that there existed a legally recoverable debt or other liability, in discharge of which the cheques were issued.
10. In view of the language of Sections 138 and 139, it is obligatory for the court to proceed on the presumption as stipulated in Section 139 of the N.I. Act, which is a presumption of law, as distinguished from a presumption of facts. Provided the facts required to form the basis of a presumption of law exist, the court does not have discretion but to draw the statutory conclusion. The accused thereafter is required to set up a defence and adduce evidence in support thereof for the court to believe the defence case, considering its existence to be reasonably probable on the standard of reasonability of a “prudent man”.
11. Learned counsel for the appellant places reliance on the judgment of *Uttam Ram Vs. Devindar Singh Hudan*, reported at (2019) 10 SCC 287, that of *Kishan Rao Vs. Shankargouda*, reported at (2018) 8 SCC 165

and *Shree Daneshwari Traders Vs. Sanjay Jain*, reported at (2019) 16 SCC 83 in support of the above argument.

12. Learned counsel for the appellant then seeks to demolish the defence raised by the accused-respondent, arguing that the same was not a probable one. As such, it is contended, the accused failed to rebut the presumption which rose under Section 139 of the N.I. Act.
13. On such score, learned counsel for the appellant submits that the accused stated in her examination-in-chief that the complainant did not want to work in his personal account for trading or speculating because he did not want his family members to know about it. However, such contention is belied by the following facts:
14. The complainant is a partnership firm and cannot have a personal account, nor could it have any family members, being a juristic entity.
15. Ramesh Kumar Gupta, who allegedly entered into secret speculative transactions with the accused, intended to shield the said facts from the family members as per the accused respondent; however, in such event, Ramesh Kumar Gupta could not have transferred the money from the account of the complainant Firm instead of dealing in cash, particularly since all the partners of the complainant Firm were the family members of Ramesh Kumar Gupta.
16. Moreover, learned counsel for the appellant argues that if the money had been advanced for the purpose of trading in the speculative segment of the share market, as alleged by the accused, all such

transactions would have been entered in a manner that the same would not be reflective in the books of account of the complainant-Firm, to shield the transactions from the public eye. However, in the present case, all the transactions were made through banking channels and were properly recorded and it was documented that the accused had allowed the complainant to speculate in share in her account. Since the onus was upon her to disprove the same since the accused alleged the same and such onus was not discharged by her, adverse inference should be drawn against her, it is submitted.

- 17.** It is next argued that the accused admitted that the money was received by her not as financial assistance but for trading in speculative market of future and options in the share market and all the money received by the accused was in lieu of the loss incurred by the complainant in such transactions. By placing reliance on the answer to question no. 8 at page 14 of the Paper Book, as well as page 17 of the Paper Book, containing the examination-in-chief of the respondent no. 1 and page 18 thereof, containing her cross-examination, learned counsel for the appellant points out that the accused admitted that she had received the said amount from the complainant. Documents on record also show such transfer of money from the account of the complainant to the account of the accused, as reflected in the balance sheet of the complainant. Moreover, Exhibits 10 and G (bank statements of the accused) confirm the receipt of the financial assistance by the accused.

- 18.** The accused, it is argued, deliberately did not produce her balance sheet for the relevant period, which would have fortified the case of the complainant, although the receipt of money by the accused is already accepted and is on record. This should give rise to an adverse inference against the accused.
- 19.** It is next argued on behalf of the appellant that the CBI seized on April 4, 2009 from the office of the husband of the accused at 136, Cotton Street, Kolkata, the cheque book which initially contained the cheque leaves from Nos. 713317 to 713388, but was bereft of the said cheque leaves which had been issued in the manner as set out in Exhibits 10 and G, which are the bank statements of the accused and as indicated in the evidence of the accused when the cheque book was seized.
- 20.** It is argued that several cheques from the series, to which the cheque book-in-question pertained, were issued, as per reflection in the bank statements of the accused and two cheques, bearing nos. 713353 and 713354, were used by the accused to withdraw cash. The cheques bearing nos. 713341 and 713342 were issued in favour of the relatives of the accused and honoured duly, prior to the CBI raid, which is also corroborated from the bank statements of the account of the accused maintained with the Axis Bank.
- 21.** That apart, learned counsel for the appellant argues, Entry Nos. 1,4,5,12 and 13 of the Seizure list indicate that, upon seizure of a particular cheque book, if it transpired that cheques contained therein

were cancelled or were blank or were blank with the signature of the accused, they were individually recorded as such in the Seizure list.

- 22.** The, the irrefutable consequential conclusion can only be that the cheque book which initially contained cheque leaves from No. 713317 to 713388, bereft of the actual cheque leaves, were seized by the CBI. Hence, the contention of the accused, that the cheques-in-question were lying with the CBI at the relevant juncture, is patently belied.
- 23.** Moreover, no complaint about the alleged procurement of cheques mysteriously was made by the accused to any authority having jurisdiction at any point of time. Thus, such allegation of mysterious procurement of the cheques was a mere afterthought, it is alleged.
- 24.** The accused/DW1, during her cross-examination, said that she did not know the meaning of “issue”, although she holds a Masters Degree in English and referred to “issue” in her statement recorded under Section 313 of the CRPC. However, during such cross-examination, DW1 did not say that she had not issued the subject cheque, skilfully evading the issue.
- 25.** The accused also admitted in her cross-examination that the seizure list of CBI contained cheque nos. 713317 to 713388, signed by her.
- 26.** Placing reliance on *Rahul Sudhakar Anantwar Vs. Shivkumar Kanhiyalal Shrivastav*, reported at (2019) 10 SCC 203, learned counsel argues that the signature on a cheque, if admitted, and the defence

not being probable, it cannot be said that the accused rebutted the statutory presumption satisfactorily.

- 27.** It is further contented by the appellant that, admittedly, there was not agreement between the accused and the complainant firm with regard to trading/speculation in the share market, that too, by using the bank account of the accused, although the accused, as DW1, admitted that the money from the complainant firm had come to her account, but for a different cause.
- 28.** The accused also admitted in her evidence that she had not received any remuneration/commission from the complainant for such speculation in the stock market by using her name in the bank account. Such admissions, coupled with the conspicuous silence of the accused even after deriving knowledge of the subject cheques having been presented for encashment and even upon receipt of the demand notice issued by the complainant's advocate, tantamount to an admission of the accused regarding the receipt of such money. The accused failed to corroborate her alternative case of a different cause for the receipt of money, thereby failing to discharge the onus of proving such case, which lay upon her.
- 29.** Cheque no.713386, to the tune of Rs. 1,00,00,000/-, which was seized by the CBI as Entry No. 15 of the Seizure List (Exhibit C) was drawn in favour of the complainant, though the same had not been made over to the complainant. Thus, it is contended, the accused was liable to pay such sum to the complainant, which liability could

not have arisen on account of profit and/or loss during the course of speculation in the future and options segment of the share market, because it would be preposterous to imagine that a person would be able to foresee the profits and /or losses, arising out of such business in advance.

- 30.** As such, learned counsel for the appellant assails the impugned judgment of the Sessions Judge, acquitting respondent no.1, on the above grounds.
- 31.** On the other hand, learned counsel for the respondent no.1 argues that there are multiple basic infirmities in the complaint, in as much as the amount of financial assistance given to the accused by the complainant was not disclosed, nor was any agreement or document supporting such contention produced. The complainant could not establish the existence of a legally enforceable debt, which is a pre-condition to invoke Section 138 of the N.I. Act. That apart, the complaint does not reveal if and when the cheque was handed over to the complainant by the accused person or when the cheque was deposited. Hence, it is contended that the basic ingredients of Section 138 of the N.I. Act were not satisfied.
- 32.** Learned counsel for the respondent no.1 next argues that that the complainant illegally procured the cheques-in-question, since the said cheques were seized by the CBI from her husband's office on April 4, 2009, which fact is borne out by the relevant portion of the Seizure List at serial no. 7 thereof, which records the seizure of one cheque

book of current account no.277010200019761 of the Axis Bank, Burrabazar Branch in the name of Kavita Saraff containing the cheque nos. 713317 to 713318, all signed by Kavita Saraff. The said evidence is clinching enough to show that the cheques were supposed to be in the custody of the CBI as per their Seizure List at the relevant juncture, thereby defeating the complaint under Section 138 of the N.I. Act.

- 33.** In the cross-examination of PW1, it was admitted that the PW1 had received the impugned cheque but he could not say on which date the same was received, nor did he know whether the present cheque was with him or with the accused at the time of the CBI raid as borne out at pages 10 and 11 of the Paper Book.
- 34.** The concerned cheque, it is argued, was not with the complainant till March 31, 2009, otherwise it would have been reflected under the head 'cheques in hand' of the balance sheet appearing at page 9 of the Supplementary Paper Book, since the cheques were dated in the month of November, 2008.
- 35.** Learned counsel next contends that, for the accused to raise a probable defence, the evidence on behalf of the complainant can be relied upon. In view of the provision of Section 118 of the N.I. Act, the date of cheque is assumed to be the date of the issuance of the cheque, if not mentioned otherwise, that is, in the month of November, 2008. However, the same was presented for encashment only in the month of May, 2009, that is, after a delay of about 5

months and 20 days, just before the validity of the cheque was about to expire, that too after the raid of the CBI on April 4, 2009, when the cheques were supposed to be in the custody of the CBI as per their own seizure list. No reason therefor was cited in the complaint.

36. The respondent no.1 further argues that the complainant has miserably failed to prove that it is the legal 'holder' of the subject cheque and has 'received' the cheque. None of the partners of the firm were produced by the prosecution as witness to throw light on the aspect of issuance of cheque, particularly when only Ramesh Gupta, one of the partners, has made ambiguous and absurd statements. It is argued that, as per the provisions of Section 114 of the Evidence Act, a negative inference can be drawn against the complainant for withholding such vital witnesses.
37. The basic ingredient necessary to have committed the offence under Section 138 of the N.I. Act has not been satisfied in the present case, it is argued, since the cheque has not been proved to be 'handed over' by the accused and/or the complainant could not prove that it 'received' the cheque from the accused. In this regard, learned counsel for the respondent no.1 places reliance on *Thiruvananthapuram Vs. K.S. Babu* and *Kamalammal Vs. Mohannan*, both unreported judgments, as well as, *M.S. Narayan Menon Vs. State of Kerala*, reported at AIR 2006 SC 3366.
38. Learned counsel further argues that, in view of absence of any proof that the cheque was 'received' by the holder and not procured illegally,

the presumption under Section 139 of the N.I. Act is not applicable and, even if assumed to be applicable, was sufficiently rebutted.

- 39.** That apart, learned counsel argues that there was no legally enforceable liability of the accused towards the complainant.
- 40.** By highlighting relevant portions of the FIR and the Charge-Sheet, learned counsel argues that those did not corroborate the allegation of the existence of any legally enforceable liability on the part of the accused.
- 41.** Learned counsel for the respondent no.1 next argues that the complainant's books of accounts are false and manipulated, since no bank will provide an unsecured loan of such a huge amount (Rs. 63 crore), that too, without any document. When the complainant is paying an interest of Rs.98 lakh to the bank, he could not have given any financial assistance without any interest. The complainant-Firm is running at a huge loss of approximately Rs.1 crore and it is not credible for anybody to lend financial assistance of such an exorbitant amount to the said Firm. In support of such submissions, learned counsel places reliance on Pages 9 and 10 of the Supplementary Paper Book.
- 42.** It is further submitted that no Chartered Accountant has authenticated the balance sheet, relied on by the complainant.
- 43.** Learned counsel for the respondent no.1 contends that, to rebut the presumption under Section 139 of the N.I. Act, it is open to the

accused to rely on the materials produced by the complainant in order to raise a probable defence.

- 44.** In support of such proposition, learned counsel relied on John K. *John Vs. Tom Varghese* [(2007) 12 SCC 714], *K. Prakashan Vs. P.K. Surenderan* [(2008) 1 SCC 258], *M.S. Narayan Menon Vs. State of Kerala* (supra) and *Basalingappa Vs. Mudibasappa* [(2019) 5 SCC 418].
- 45.** Learned counsel submits that there was no legal agreement executed by the complainant in respect of the alleged loan. The complainant failed to produce any written document of loan confirmation or loan agreement to substantiate his claim of advancing financial assistance of such a huge amount. Reliance, in such regard, is placed on the following judgments:
- I) *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde* [AIR (2008) 4 SC 1325];
 - II) *John K. John Vs. Tom Varghese* (supra);
 - III) *Rev. Mother Marykutty Vs. Reni C. Kottaram* [(2013) 1 SCC 327];
 - IV) *Basalingappa Vs. Mudibasappa* (supra).
- 46.** Learned counsel further submits that the issue of *legal* recovery of debt is not a matter of presumption under Section 139 of the N.I. Act, which merely raises presumption in favour of the holder of the cheque that the same has been issued for discharge of any debt or other liabilities.

47. Learned counsel for the respondent no.1 next submits that the PW1 is unaware as to when and why the alleged 'financial assistance' was advanced to the accused and when he started demanding back the same. Learned counsel relied on relevant extract from pages 7 and 8 of the Paper Book to harp on such point and relied on *John K. Abraham Vs. Simon C. Abraham [(2014) 2 SCC 236]* and *M.S. Narayan Menon* (supra), in such context.
48. It is next argued that the complainant deliberately withheld relevant evidence, being his bank statement, which would have substantiated the contents of the CBI Charge Sheet. No prudent person, it is argued, would lend financial assistance to anybody by illegally procuring money from the bank.
49. Placing reliance on Section 114 of the Evidence Act, it is argued that if such a relevant evidence is withheld by the complainant company, the court has to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the complainant company, and the same would be enough to rebut the presumption, if any, in favour of the accused. Learned counsel, in such respect, relied on *Narayan Menon* (supra) and *Kundan Lal Rallaram Vs. Evacuee Property [AIR 1961 Supreme Court 1361]*.
50. The complainant Firm did not have legal and moral funds to grant such a huge amount as financial assistance, it is next argued on behalf of respondent no. 1, placing reliance on the deposition of PW1, a partner of the complainant Firm (at page 8 of the Paper Book) to the

effect that the said witness did not think that the source of money is a relevant issue in this case.

51. According to learned counsel for the respondent no.1, this proves that it was not the company's own fund but illegally procured fund from the Central Bank of India. It is implied that no prudent mind will lend financial assistance after putting his life and liberty at stake by defrauding a nationalized bank. Learned counsel places reliance on *John K. Abraham* (supra) and *Basalingappa* (supra) as well as *K. Prakashan* (supra) and *K. Subramani Vs. K. Damodara Naidu* [(2015) 1 SCC 99] in this regard.
52. Thus, it is contended that the prosecution against the accused under Section 138 of the N.I. Act was not maintainable in law.
53. As far as the contentions of the complainant are concerned, learned counsel for the respondent no.1 submits that the proposition, that the counterfoil and not the cheques had been seized by the CBI is absurd, since the Seizure List mentions the cheques which had been seized as "signed by Kavita Saraff". There cannot arise any question of her signature appearing in the 'counterfoil' of the cheques.
54. Reliance of the complainant on some other cheques passed in the Seizure List need not necessarily mean issuance of the impugned cheques, it is argued. The Seizure List was not disproved and was prepared by an independent investigating agency. The case of the complainant was, thus, not proved beyond reasonable doubt.

- 55.** The police itself had seized the impugned cheques from the office of the husband of the accused, so any misuse of the cheques would be detrimental to the person himself who manipulates with the instrument and no further complaint was required. Further, the suggestion had been put forward to PW1 (Ramesh Gupta) during his cross-examination that the impugned cheques had been illegally procured by the complainant Firm after the CBI raid.
- 56.** Learned counsel for respondent no.1 submits that no reply to the demand notice was given as, at that time, the respondent no.1 was pregnant and had delivered a baby after a week on May 27, 2009. That apart, the CBI investigation was on and respondent no.1 was undergoing mental tension as she was maliciously implicated and framed in the said case. No reply to the notice was given by her under such circumstances. Failure to reply to a notice, it is contended, does not attract any presumption under Section 139 of the N.I. Act, to the effect that the cheque was issued.
- 57.** In such context, learned counsel relies on *Basalingappa* (supra), *John K. Abraham* (supra) and *Thiruvananthapuram* (supra).
- 58.** A bare perusal of the Seizure List, it is argued, will reveal that the cheque book, along with the impugned cheques, were seized by the CBI on April 4, 2009, thus making it impossible for the impugned cheques to be delivered to the appellant and subsequently being dishonoured via a return memo dated May 4, 2009.

- 59.** The Balance Sheet attached does not support the appellant's contention, as evident from page 9 of the Supplementary Paper Book. No mention of the impugned cheque finds place in the 'cheque in hand' section of the said balance sheet, which infirmity is sufficient to create a probable doubt as regards the complainant's case, it is argued. The balance sheet also discloses that the appellant Company was running at a loss of Rs.1 crore in the 'net loss' section of the same (page 10 of the Supplementary Paper Book). Thus, it is highly improbable that the appellant Company would give financial assistance to the respondent without levying any interest upon the same.
- 60.** Remuneration was paid for share speculation to the company of the husband of the accused and not to the accused. Thus, Kavita Saraff never received any remuneration from the complainant. As mentioned in her deposition, the husband of respondent no.1 was a sub-broker of M/S Motilal Oswal and she was a client of the same. The brokerage generated in her account, while speculating on behalf of the complainant, was paid to the parent broker Motilal Oswal, a certain percentage of which brokerage was paid to her husband's company as he was the sub-broker of the Company. The respondent no.1 never received any remuneration from the complainant company for speculating in the stock market. Hence, no fact has been proved commensurate with the standard of reasonability of a "prudent man". *M. S. Narayan Menon* (supra) is again referred to in such context.

- 61.** *K. Prakashan* (supra) is reiterated in support of the proposition that, if two views are possible, the appellate court shall not reverse a judgment of acquittal only because another view is possible to be taken. Moreover, it is argued, the onus on an accused is not as heavy as that on the prosecution, which may be compared with the defendant in a civil proceeding, as held in *M. S. Narayan Menon* (supra).
- 62.** The submissions made in C.R.A. No.424 of 2017 are adopted in connection with the other appeals as well, apart from certain factual distinctions as indicated above.
- 63.** For a proper appreciation of the legal backdrop against which the present case is set, the cumulative scope of Sections 138 and 139 of the N.I. Act come to the forefront. The said Sections are set out below:

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 twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless –

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

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

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.”*

- 64. Section 139 raises a reverse presumption against the accused by providing that the holder of a cheque shall be presumed to have 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.
- 65. The Explanation to Section 138 provides that, for the purposes of the said Section, “debt or other liability” means a legally enforceable debt or other liability.
- 66. The view of the Supreme Court was initially that the presumption mandated under Section 139 does not include the existence of a ‘legally enforceable’ debt or other liability, as exemplified in *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde*, reported at (2008) 4 SCC 54.
- 67. However, the law has since been settled in *Uttam Ram* (supra), wherein the Supreme Court virtually overruled the ratio of *Krishna Janardhan Bhat* (supra) and held that the presumption mandated by

Section 139 does indeed include the existence of a legally enforceable debt or liability.

- 68.** Proceeding on such premise, if we explore the standard of proof required for the purpose of Sections 138 and 139, *Uttam Ram* (supra), which was cited by the appellant itself, clearly laid down the proposition that, to disprove the presumption raised under Section 139 of the N.I. Act, 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. It was clearly held that the accused, apart from adducing direct evidence to prove non-existence of the contract or the debt or liability, may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may shift again on to the complainant.
- 69.** In *Rangappa Vs. Shi Mohan*, reported at (2010) 11 SCC 441, also cited by the appellant, it was further elaborated that 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. It was further specified by the Supreme Court 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”. 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. 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.

- 70.** The aforesaid basic principles have been reiterated in several judgments cited by both the parties.
- 71.** The other legal principle, hitting at the root of this court's jurisdiction is that, while exercising an appellate power against a judgment of acquittal, the High Court should bear in mind the well-settled principle of law that where two views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below. The said proposition found place in *M. S. Narayana Menon* (supra), as approved in *John K. John* (supra), both of which have been relied on by the respondent no.1.
- 72.** As such, the scope of inquiry in the appeal is circumscribed by the aforesaid contours.
- 73.** If the evidence-on-record in the instant case is taken into consideration, it is the test of "preponderance of probability" that has to be applied to the case made out by the accused/respondent no.1 for the purpose of rebuttal of the presumption under Section 139 of the N.I. Act. Further, the materials submitted by the complainant can be relied on by the accused in order to raise such a defence, in some cases not requiring adducing evidence of his/her own.

74. Applying the said standard of proof, a perusal of the evidence-on-record indicates that a reasonable doubt, befitting a prudent man, is cast upon the prosecution case insofar as, although the Seizure List of the CBI indicates that the entire cheque book, which originally contained a bunch of cheques including the incriminating ones, was seized; however, other entries in the same Seizure List mention independent recovery of some of the cheques which were part of the same cheque book. Such cheques were, in fact, separately mentioned as independent and separate items of the CBI Seizure List, including the relevant details as regards signatures/absence of signatures thereon, which indicates that the cheque book, though recovered, did not contain all the leaves which were originally contained therein, at the relevant juncture. If the defence case is to be accepted, the incriminating cheques were in the custody of the CBI at the relevant juncture, contained in the seized cheque book, thereby obviating the possibility of such cheques having been issued by the accused at the relevant juncture. On the other hand, the prosecution case is that the independent seizure of other cheques from the same cheque book, details of which were separately given in several items of the Seizure List, indicates that the CBI merely seized the empty, or partially empty, cheque book which might not have contained the leaves of the incriminating cheques, thereby lending credence to the possibility of the accused having issued the dishonoured cheques. Equal weight can very well be attached to either of such theories for the purpose of preponderance of probabilities.

- 75.** Although Section 114 of the Indian Evidence Act, clothes an official act with the presumption of being duly done, upon subsequent adduction of evidence, in particular the Seizure List itself, such presumption is rendered academic, since the aforesaid facts are elicited from the said Seizure List itself. Even if a presumption of correctness is attached to the Seizure List, the Schrodinger's cat dilemma between the two probable views, diametrically opposite to each other, remains. Akin to the cat, there is equal probability, simultaneously, of the dishonoured cheques having been seized and not seized by the CBI during the relevant period.
- 76.** A perusal of Section 138 reveals that the primary ingredients of an offence under the said provision are that: (i) the cheque has to be drawn by the accused; (ii) it should be for the payment of any amount of money to another person; (iii) such payment has to be for the discharge, in whole or in part, of any debt or other liability. Such debt or other liability, within the purview of the Explanation to the section, means a legally enforceable debt or other liability.
- 77.** In the present case, no valid documentary evidence could be produced by the complainant and/or the prosecution for substantiating the legality and/or existence of any "enforceable debt or other liability" on the part of the accused and the Court has to resort to a balance of probabilities between the contentions of the parties.
- 78.** A plausible case has been made out by the defence as regards the non-existence of any such legally enforceable debt or other liability,

also because the said debt/liability is not reflected from the relevant balance-sheet which was produced as evidence. Thus, illegal share transactions, which were the premise of such alleged liability, could not be construed, even as per the prosecution case, to be “legally enforceable”.

- 79.** That apart, the ‘cheque in hand’ section of the exhibited balance sheet does not reflect the alleged debt/liability.
- 80.** The credibility of the prosecution case further comes under the scanner, since it is not logical to a prudent man as to why the complainant had invested through the accounts of the Partnership Firm, which comprised of other family members of the complainant, if it was the intention of the complainant to hide the clandestine deals of share transactions from his family members.
- 81.** Hence, from the evidence adduced by the prosecution itself, several questions arise as regards the veracity of the chain of events sought to be projected by the prosecution.
- 82.** Certain other irregularities visit the prosecution case as well. As rightly argued by the respondent no.1, the forlorn picture of the balance-sheet and account statements would reflect a sorry state of affairs for the finances of the accused. Hence, the accused, within the prudence of a normal person, could not have undertaken such illegal transactions, as alleged, *gratis* for the complainant, without any consideration whatsoever.

- 83.** Hence, the very premise of the presumption raised by Section 139 in the present case is demolished sufficiently by applying the standard of preponderance of probability.
- 84.** That apart, it is well-settled that, merely because a different view is possible on the facts of the case, the Appellate Court shall not set aside or reverse the findings and/or decision of the Trial Court.
- 85.** Upon a perusal of the judgment and order impugned in the appeal, it is evident that the Trial Judge took sufficient pains to discuss all the relevant facets of the matter and the governing law and, upon comprehensive consideration of the materials-on-record and the law applicable, arrived at the findings and the final decision assailed in the present appeal. Merely because of a second opinion is possible, it is not for this court, sitting in appeal, to reverse the said decision of the Trial Court, in the absence of any infirmity and/or illegality in the Trial Court's judgment. The inferences drawn by the Trial Court and the conclusions arrived at are well within the domain of preponderance of probability. Thus, the judgment of the Trial Court, if tested on the anvil of such a standard of proof as enunciated by the Supreme Court in several judgments for the purpose of rebuttal of the presumption under Section 139 of the N.I. Act, there is no scope of interfering with the impugned judgment and order of acquittal.
- 86.** In view of the above considerations, there is no merit in the appeals.
- 87.** Accordingly, CRA No.424 of 2017, CRA No.425 of 2017, CRA No.426 of 2017 and CRA No.427 of 2017 are dismissed. The judgments and

orders of the Trial Court, challenged respectively in the said appeals, are hereby affirmed.

- 88.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)