

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ **CRL.REV.P. 398/2018 & CRL.M.A. 8702/2018 (Stay)**

Date of decision: 25th June, 2021

IN THE MATTER OF:

BARUN KUMAR ..... Petitioner

Through Mr. Dheeraj Malhotra and Mr. Gaurav  
Gupta, Advocates

versus

STATE OF NCT OF DELHI & ANR. .... Respondents

Through Mr. Hirein Sharma, APP for the State  
Mr. Shakeel Sarwar Wani and  
Mr. Himanshu Garg for respondents  
No.2 to 4

**CORAM:**

**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

**SUBRAMONIUM PRASAD, J.**

1. This revision petition is directed against the judgment dated 24.04.2018, passed by the Additional Sessions Judge, South District, Saket Court, New Delhi, in Criminal Appeal No.8045/2016 and Criminal Revision Petition No.8352/2016 dismissing the appeal filed by the petitioner herein and affirming the judgment of the learned Metropolitan Magistrate convicting the petitioner for offences under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as 'the N.I. Act') sentencing the petitioner to undergo simple imprisonment for five months and pay Rs.20 lakh as compensation to the complainant.

2. The respondent No.2/complainant instituted a complaint against the petitioner herein for an offence punishable under Section 138 of N.I. Act

*inter alia* stating as under:

a) The accused/petitioner herein is known to the complainant for several years and had approached the complainant with a request of loan stating that he is about to get the authorized dealership of HP for which he is required to deposit about Rs.20,00,000/- within few days and he needs a loan of Rs. 15,00,000/-. It is stated in the complaint that the accused/petitioner herein had shown the complainant some letters in this regard.

b) It is stated in the complaint that the accused/petitioner herein told the complainant that once he gets the dealership he would be able to repay the loan. It is stated that believing the representation the complainant advanced a loan of Rs.15 Lakhs to the petitioner herein in the following manner:

- i. Rs.50,000/- was paid by way of cash.
- ii. Rs.6,50,000/- was paid by cheque bearing No.963019 dated 15.12.2010 drawn on UCO Bank.
- iii. Rs.8,00,000/- was paid by cheque bearing No.967981 dated 20.12.2010 drawn on UCO Bank.

The said cheques were duly encashed on presentation.

c) It is stated that in view of his liability to repay the loan amount, the accused/petitioner herein gave one cheque bearing number 768427 dated 31.12.2010 for an amount of Rs.15,00,000/- drawn on UCO bank in favour of the complainant. It is stated that the accused/petitioner herein also issued one receipt dated 18.12.2020 acknowledging the receipt of Rs.15,00,000/- as loan. It is stated in the complaint that the complainant was assured by the accused/petitioner

herein that the cheque will be encashed on its presentation. It is stated in the complaint that believing the presentation to be true the cheque was deposited by the complainant for encashment but it was returned with endorsement "*Funds Insufficient*" vide cheque return memo dated 01.01.2011. It is stated that a legal notice dated 03.01.2011 was sent by the complainant to the accused/petitioner herein for payment of dues within 15 days. It is stated that the notice was duly served on the accused/petitioner herein. It is stated that despite receipt of notice the accused/petitioner herein failed to pay the cheque amount within the prescribed time and therefore a complaint under Section 138 of the N.I. Act was registered against the petitioner herein before the learned Metropolitan Magistrate. Summons was issued. Upon service of summons, the accused/petitioner herein entered appearance on 09.06.2011 and was admitted on bail on 16.11.2011. Notice under Section 251 Cr.P.C was served on the accused/petitioner herein on 30.01.2012, to which he pleaded not guilty and claimed trial.

d) The complainant examined himself as CW-1. He was cross examined by the petitioner herein in great detail. It is pertinent to mention here that the complainant did not produce his books of account.

e) The statement of the petitioner herein was recorded under Section 313 Cr.PC. The case put up by the petitioner herein reads as under:

*“In the year 2010, complainant told me that he had procured an order for the supply of 150 computers to the various Members of Parliament and he further told me that this deal will not be done through Sub*

*Computech and it should be done you and me only. You will receive all the payment within 20 days of the delivery of the computers. I supplied to the complainant approx. 10 computers alongwith its accessories as per his requisition amounting to Rs. 6.50 Lacs approx. Instead of making the payment within the assured time of 20 days, he handed over to me another list of computer and accessories to be supplied. Then, complainant told me that in order to clear my dues towards the persons from whom I had purchased the computers, he told me to hand over to him a cheque of Rs.15 Lacs. Though I was reluctant initially, but on his assurance. I agreed to it and complainant assured me to arrange a loan for me against this cheque through someone else. I had only filled the amount in words and figures on the cheque as well as signed the cheque and other particulars were left blank. However, complainant had not paid me Rs.6.50 Lacs for which I had supplied him computer and accessories. On the other hand, he has misused the said cheque which he procured from me as a security for getting the loan. However, till date, I have not received any loan against this cheque.*

*The complainant had procured the pronote also from me for getting me the loan and the said pronote is not addressed to any particular person.”*

According to the petitioner, he was to procure material for assembling the computers for supply to the complainant and the cheque was given as a security for the loan which was to be arranged by the complainant from other parties.

The petitioner has contended that cheque No. 963019 dated 15.12.2010 for an amount of Rs.6,50,000/- and cheque No. 967981 dated 20.12.2020 for an amount of Rs.8,00,000/- were bearer cheques which were given to him by the complainant in order to withdraw

money from his own bank account as the complainant told him that he cannot go to bank himself. The petitioner states that he went to the bank to encash the cheques. The accused/petitioner herein stated that one Vijay Bhadana accompanied him to the bank and the cheques were encashed and the money was handed over to the complainant. The accused/petitioner herein also stated that the complainant has not given any amount to him in cash besides two bearer cheques which were encashed and the amount has been given to the complainant.

f) The Trial Court after analysing the material on record disbelieved the contention of the accused/petitioner herein that the cheque in question was given to the complainant as a security for the loan to be arranged by the complainant. The learned Metropolitan Magistrate stated that apart from the statement of the accused/petitioner herein no evidence has been produced in support of his claim. The learned Metropolitan Magistrate was of the opinion that it is very unlikely that for a future loan to be arranged, the petitioner would give a receipt without enquiring about the name of the person from whom the loan is sought to be arranged. The learned Metropolitan Magistrate placed reliance on the receipt dated 18.12.2020, whereby the accused/petitioner herein had admitted that cheque No. 768427 had been given by him for the loan of Rs.15,00,000/-. The learned Metropolitan Magistrate rejected the contention of the petitioner that the receipt is not a stamped document and hence it cannot be taken as evidence, stating that the document is not a promissory note and it is an acknowledgment receipt by the accused/petitioner herein of having taken a loan. The learned

Metropolitan Magistrate also rejected the contention of the petitioner herein that the two cheques bearing Nos. 963019 and 967981 for Rs.6,50,000/- and Rs.8,00,000/- respectively were bearer cheques which were given by the complainant to the accused/petitioner herein to withdraw the amount and the amount was taken back by the complainant. The learned Metropolitan Magistrate observed that though petitioner herein has stated that he was accompanied by one Vijay Bhadana while he was withdrawing the cheque and he had handed over the amount to the complainant himself but in his deposition as DW-4 it was stated by the accused/petitioner herein that the amount of Rs.6,50,000/- withdrawn by him was handed over to the wife of the complainant in the presence of the said Vijay Bhadana whereas the other sum of Rs.8,00,000/- was handed over by him to the complainant himself. The learned Metropolitan Magistrate was of the opinion that the said Vijay Bhadana would have been the best witness to prove the innocence of the accused/petitioner herein and the said witness has not been produced by the accused/petitioner herein. The learned Metropolitan Magistrate therefore drew adverse inference against the accused/petitioner herein. The learned Metropolitan Magistrate also rejected the contention of the petitioner that there is no reference of loan in the Income Tax returns of the complainant and that the amount of loan is not legally recoverable as the same was advanced in violation of Section 269 SS of Income Tax Act, 1961 (hereinafter referred to as 'the IT Act'). The learned Metropolitan Magistrate held that violation of Section 269 SS of the IT Act, if any, at best could be an offence under Section 271 D of IT

Act and it does not tantamount to making the loan amount as legally not recoverable. The learned Metropolitan Magistrate, therefore, *vide* order dated 28.03.2016 convicted the accused/petitioner herein for an offence under Section 138 of the N.I. Act. Vide a separate order dated 12.04.2016 the learned Metropolitan Magistrate sentenced the petitioner herein to undergo Simple Imprisonment for five months and also directed the petitioner herein to pay a compensation of Rs.15,00,000/- to the complainant.

g) The said order was challenged by the petitioner herein by filing an appeal being Criminal Appeal No. 8045/2016, before the Appellate Court. The complainant also filed a revision petition being CRL. Revision Petition No. 8352/2016 for enhancement of the compensation amount.

h) It was argued by the petitioner/accused before the learned Additional Sessions Judge that the presumption under Section 139 of the N.I. Act is rebuttable. It was argued that the standard of proof on the part of an accused and that of a prosecution in a criminal case is different. It is contended that the standard of proof for the defence is one of preponderance of probabilities whereas it is for the complainant to prove that the accused has committed the offence beyond reasonable doubt. It was contended that where the chances of false implication cannot be ruled out, the background facts and the conduct of parties together with their legal requirements are required to be taken into consideration. The accused/petitioner herein placed reliance on the judgment of the Supreme Court in M.S. Narayana Menon @ Mani Vs. State of Kerala, (2006) 6 SCC 39, which had

held that once the accused has discharged the initial burden, the burden to prove then reverts back to the complainant and it is not required for the accused to disprove the prosecution case. It was stated by the petitioner/accused that the said judgment held that for rebutting presumption under sections 118(A) & 139 NI Act what is needed is to raise a probable defence and once such defence is shown to exist then it was for the prosecution to prove its case beyond reasonable doubt. The accused/petitioner herein also contended that the payments have not been shown by the complainant in Income Tax Returns and therefore the entire transaction is illegal and thus no legally enforceable liability remains against the accused/petitioner herein. The learned Additional Sessions Judge placed reliance on the receipt dated 18.12.2020. The learned Additional Sessions Judge accepted the findings of the learned Metropolitan Magistrate that failure on the part of the accused/petitioner herein to examine Vijay Bhadana does not substantiate the case of the accused. The learned Additional Sessions Judge held that the case of the accused that the cheques were encashed and the amount was returned back to the complainant cannot be believed. The learned Additional Sessions Judge therefore confirmed the order of the Metropolitan Magistrate and enhanced the compensation to Rs.20 Lakhs.

i) It is this order which is under challenge in the instant revision petition.

3. Heard Mr. Dheeraj Malhotra, learned counsel for the petitioner, Mr. Shakeel Sharwar Wani, learned counsel for the complainant/respondent No.2 and Mr. Hirein Sharma, learned APP for the State and perused the

material on record.

4. Mr. Dheeraj Malhotra, learned counsel for the petitioner states that two bearer cheques amounted only to Rs.14,50,000/- and there is nothing to show that the complainant gave Rs.50,000/- to the petitioner herein. He states that the receipt does not mention as to who has given the loan and for what purpose and it also does not mention the date by which the so-called loan was to be repaid. He states that in the absence of any statement in the receipt that it is the complainant who has given the loan to the accused it cannot be said that there is anything due and payable by the petitioner to the complainant. He states that the complainant examined himself as CW-1 and stated that the transaction took place in the presence of one Vijay Bhadana. He states that the said witness in whose presence the request for loan was allegedly made, and in whose presence the receipt was allegedly taken have not been produced/examined. He states that the complainant has stated that he and his wife are income tax assesses. They have not disclosed the transaction in their Income Tax returns and the returns have not been produced. He states that the complainant has stated that nondisclosure of the loan was on the advice of the Chartered Accountant but the Chartered Accountant was not examined. He states that it is highly improbable if not impossible that a Chartered Accountant would advise not showing this transaction in view of Section 269 SS of the IT Act. He states that no Civil suit for recovery of the amount was filed by the complainant. He further states that in the complaint dated 28.11.2011 lodged by Complainant with the local police station under sections 405, 409, 420. read with Section 120B IPC, he claims to have been cheated of a VAT amount of Rs.29,174/- (in November & December, 2010) yet he makes no mention of having been

cheated for the amount of Rs.15,00,000/-. He further states that before the disbursement of the alleged loan the accused/petitioner herein supplied certain equipment to an organisation (which is controlled and managed by the complainant) for a sum of Rs.5,30,209. Later, on the request of the complainant, the said amount was bifurcated between consideration for sale of equipment and corresponding VAT thereon. He states that later complainant disputed charging of VAT, amounting to Rs.29,174/- (approximately). He states that in this regard, the complainant had filed a complaint before the Commission of Trade & Taxes on 05.01.2011. He states that there have been other disputes between the parties and the version of the complainant that the loan was given to the petitioner herein cannot be believed. He states that no prudent man will advance loan to a person with whom he has several disputes. The learned counsel for the petitioner also contends that the complainant and Vijay Bhadana are co-accused in many other cases and therefore the petitioner did not examine Vijay Bhadana. He further states that the bank statements of the complainant shows that the complainant never had a closing balance of more than Rs.2,10,000/- during last three years until the issuance of bearer cheques. He states that on 15.12.2010, the complainant deposited Rs.5,98,000/- in his bank account just prior to encashment of bearer cheque, bearing number 963019, for an amount of Rs.6,50,000/-, by the petitioner herein. He states that no common man with reasonable prudence would first deposit cash of Rs.5,98,000/- and thereafter issue a bearer cheque for withdrawal of cash, on the same day to be given as loan. It is further argued by the learned counsel for the petitioner that the so-called transaction is contrary to Section 269 SS of the IT Act and therefore is not legally enforceable debt. He further stated that the

complainant has not filed any civil suit for recovery of the alleged loan amount. The learned counsel for the petitioner contends that the presumption under Section 139 of the N.I. Act is rebuttable and the standard of proof for the defence is based on pre-ponderance of probabilities. The learned counsel for the petitioner places reliance on the judgment of the Supreme Court in M.S. Narayana Menon (supra), to contend that inference of pre-ponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies. Relying on the judgment of Supreme Court in Hiten P. Dalai v. Bratindranath Banerjee, **MANU/SC/0359/2001**, Mr. Dheeraj Malhotra, learned counsel for the petitioner contends that the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "*prudent man*". He states that the petitioner has given enough material to rebut the presumption but the Courts below have erred in convicting the petitioner on the ground that he has not been able to prove that he was not liable to pay money to the complainant beyond reasonable doubt. Mr. Malhotra contends that the burden of proving innocence beyond reasonable doubt has been placed on the petitioner which is contrary to the law laid down by the Supreme Court.

5. On the other hand, Mr. Shakeel Sarwar Wani, learned counsel for the complainant placed reliance on the acknowledgment receipt. He states that the two cheques have been given to the accused/petitioner herein which were encashed and a receipt for the same has been given by the accused/petitioner on 18.12.2010. He states that the accused/petitioner

herein has not been able to rebut the initial burden cast upon him. He states that two courts below have analysed the case and has come to a conclusion that the petitioner has committed an offence under Section 138 of the Negotiable Instruments Act and the judgments are not perverse warranting interference under Section 397/401 Cr.P.C. and that it is not open to this Court to hear the petition as an appeal.

6. The scope of the revision petition under Sections 397/401 Cr.P.C. read with Section 482 Cr.P.C. is extremely narrow. The revisional Court is not a court of appeal and revisional Court does not substitute its own conclusion to the one arrived at by the courts below just because another view is possible unless the view taken by the courts below is perverse and contrary to law. In State v. Manimaran, reported as (2019) 13 SCC 670, the Supreme Court observed as under:

***“16. As held in State of Kerala v. Puttumana Illath Jathavedan Namboodiri [State of Kerala v. Puttumana Illath Jathavedan Namboodiri, (1999) 2 SCC 452 : 1999 SCC (Cri) 275] , ordinarily it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as by the Sessions Court in appeal. When the courts below recorded the concurrent findings of fact, in our view, the High Court was not right in interfering with the concurrent findings of fact arrived at by the courts below and the impugned order cannot be sustained.”*** (emphasis supplied)

In State of Haryana v. Rajmal, reported as (2011) 14 SCC 326, the Supreme Court observed as under:

***“14. In State of A.P. v. Pituhuk Sreeinvasa***

*Rao [(2000) 9 SCC 537 : 2001 SCC (Cri) 642] this Court held that the exercise of the revisional jurisdiction of the High Court in upsetting the concurrent finding of the facts cannot be accepted when it was without any reference to the evidence on record or to the finding entered by the trial court and the appellate court regarding the evidence in view of the fact that revisional jurisdiction is basically supervisory in nature.*

*It has been also held by this Court in Amar Chand Agarwalla v. Shanti Bose [(1973) 4 SCC 10 : 1973 SCC (Cri) 651 : AIR 1973 SC 799] that the revisional jurisdiction of the High Court under Section 439 CrPC is to be exercised, only in an exceptional case, when there is a glaring defect in the procedure or there is a manifest error on a point of law resulting in a flagrant miscarriage of justice. (SCC p. 20, para 17 of the Report.)”* (emphasis supplied)

In State of Kerala v. Puttumana Illath Jathavedan Namboodiri, reported as (1999) 2 SCC 452, the Supreme Court observed as under:

*“5. Having examined the impugned judgment of the High Court and bearing in mind the contentions raised by the learned counsel for the parties, we have no hesitation to come to the conclusion that in the case in hand, the High Court has exceeded its revisional jurisdiction. In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction.*

*Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by re-appreciating the oral evidence. The High Court also committed further error in not examining several items of evidence relied upon by the Additional Sessions Judge, while confirming the conviction of the respondent. In this view of the matter, the impugned judgment of the High Court is wholly unsustainable in law and we, accordingly, set aside the same. The conviction and sentence of the respondent as passed by the Magistrate and affirmed by the Additional Sessions Judge in appeal is confirmed. This appeal is allowed. Bail bonds furnished stand cancelled. The respondent must surrender to serve the sentence.”*

*(emphasis supplied)*

7. The acknowledgement receipt (EX.CW-1/A) dated 18.12.2010 states that the petitioner herein has taken a loan of Rs.15,00,000/- and in lieu of the loan he is issuing cheque No.768427. The acknowledgment receipt is signed by the petitioner. The fact that there are no witnesses and the fact that it does not state as to from whom the loan is being taken does not persuade this Court to disbelieve the document. This document has been produced by the complainant. The cheque No. 768427 is in the name of the complainant and is signed by the petitioner herein. The complainant deposited the said cheque and it was returned with endorsement

*“Insufficient Funds”*. The receipt along with the cheque makes out a case under Section 138 N.I. Act. The presumption under Section 139 of the N.I. Act therefore arises in favour of the holder of the cheque i.e. the complainant and unless the contrary is proved, that the complainant has received the cheque for discharge, in whole or in part, of any debt or other liability. To rebut this presumption the petitioner/accused has stated in his statement under Section 313 Cr.P.C that the complainant told him that he had procured an order for supplying 150 computers to the Members of Parliament and that he told the petitioner herein that this deal will not be done through *Sub Computech* and it should be done by the complainant and the petitioner only. It is stated by the petitioner that the complainant told him that he will receive all the payment within 20 days of the delivery of the computers. It is stated by the petitioner that he supplied 10 computers alongwith their accessories to the complainant as per his requisition amounting to Rs.6,50,000/-. It is stated by the petitioner that instead of making the payment within the assured time of 20 days, the complainant handed over him another list of computer and accessories to be supplied. It is stated by the petitioner that the complainant told him that in order to clear his dues towards the persons from whom he had purchased the computers, the petitioner was asked to hand over a cheque of Rs.15,00,000/- to the complainant for which he was reluctant initially, but on the assurance of the complainant he agreed to it. It is stated by the petitioner that the complainant assured him to arrange a loan against this cheque through someone else. It is stated by the petitioner that he had only filled the amount in words and figures on the cheque and signed the cheque and other particulars were left blank. It is stated by the petitioner that the complainant

had not paid him Rs.6,50,000/- for which he had supplied computers and accessories to the complainant and the cheque has been misused. This defence raised by the petitioner is not sufficient to dispel the initial burden cast upon him and this does not explain as to why the second cheque for Rs.8,00,000/- was given by the complainant to the petitioner herein. There is no material to show that the complainant gave any order to the petitioner for supplying computers and accessories. The mere *ipse dixit* of the petitioner alone will not rebut the presumption. The stand of the Courts below, in disbelieving the statement of the accused/petitioner herein, does not require any interference because it cannot be said that they are perverse. The second contention raised by the petitioner that only two cheques were given for an amount of Rs.14,50,000/- does not correspond to the receipt of Rs.15,00,000/- and the contention that there is no receipt for Rs.50,000/- also does not take away the initial burden on the petitioner. Two cheques for Rs.6,50,000/- and Rs.8,00,000/- dated 15.12.2010 and 20.12.2010 respectively have been presented and money has been withdrawn. A receipt for Rs.15,00,000/- has been given. In the absence of any explanation at all as to why the receipt for Rs.15,00,000/- was given it cannot be said that the petitioner has rebutted the initial presumption which is raised against him under Section 139 of the N.I. Act. The case of the petitioner that bearer cheques were given to him and that he withdrew the money and gave it back to the complainant also cannot be accepted. The petitioner has stated that he was accompanied by one Vijay Bhadana who has not been examined. There is nothing which prevented the petitioner from requesting the Court to call Vijay Bhadana for examination. The complainant has been extensively cross-examined and the cross examination has been analysed by

two courts below and after analysing the cross-examination of the complainant the courts below have rejected the case of the petitioner that the bearer cheques were given to the petitioner who withdrew the amount and gave it back to the complainant.

8. The Supreme Court in Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197, has observed as under:

*“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.”*

\*\*\*\*\*

*“36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.”* (emphasis supplied)

9. The Supreme Court in Rohitbhai Jivanlal Patel v. State of Gujarat, (2019) 18 SCC 106, has observed as under:

*“15. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 of the NI Act is concerned, apparent it is that the appellant-accused could not deny his signatures 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 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 appellant-accused to establish a probable defence so as to rebut such a presumption.”*

\*\*\*\*\*

***“17. 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, emphasised 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 Sections 118 and 139 of the NI Act. This Court stated the principles in Kumar Exports [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513 : (2009) 1 SCC (Civ) 629 : (2009) 1 SCC (Cri) 823] as follows : (SCC pp. 520-21, paras 20-21)***

***“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 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 of the Act.*

*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 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.”* (emphasis supplied)

10. The petitioner has not been able to rebut the presumption under Section 139 of the N.I. Act. He has not denied his signatures in the cheque. He does not deny the fact that the receipt dated 18.12.2010 was given by him which acknowledges a sum of Rs.15,00,000/- taken as loan. As stated above, the fact that the receipt does not show as to from whom the loan of Rs.15,00,000/- was taken is immaterial and inconsequential for the reason that it is the complainant who has filed the receipt (CW-1/A) and cheque (CW-1/A1) which is in the name of the complainant and duly signed by the petitioner. The mere *ipse dixit* of the petitioner and the statement in defence under Section 313 Cr.P.C without any material does not rebut the presumption cast on the petitioner under Section 139 of the N.I. Act. Just by contending that the Income Tax Returns have not been filed or by stating

that complaints have been filed by the complainant against the accused does not rebut the presumption of the petitioner even on preponderance of probabilities. The fact that the loan has been given in violation of Section 269 SS of the IT Act does not mean that the Court cannot look into the documents at all. The learned counsel for the petitioner is correct that Section 269 SS of the IT Act mandates that loan in any amount over Rs.20,000/- has to be by way of account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account. Offence Section 269 SS IT Act at best makes an offence under Section 271 D of the IT Act but it does not mean that the loan of Rs.15,00,000/- has not been given by the complainant to the petitioner herein. Both the courts below have relied on the judgment of the Bombay High Court in Krishna P Morajkar v. Joe Ferrao, **2013 SCC OnLine Bom 862**, wherein the High Court observed as under:

*"26. ....the entire scheme of the Income Tax Act is for ensuring that all amounts are accounted. If some amounts are not accounted for, the person would be visited with the penalty or at times even prosecution under the Income Tax Act, but it does not mean that the borrower can refuse to pay the amount which he has borrowed simply, because there is some infraction of the provisions of the Income Tax Act. Infractions of provisions of Income Tax Act would be a matter between the revenue and the defaulter and advantage thereof cannot be taken by the borrower....."*

It cannot be said that the reliance placed by the two courts below in the said judgment is perverse requiring interference of this Court under Section 397 Cr.P.C.

11. The learned counsel for the petitioner has contended that the

complainant had instituted certain cases against the petitioner and a man of ordinary prudence would not give a loan of Rs.15,00,000/- to a person against whom complaints have been filed. The case for violation of VAT against the petitioner herein has been filed on 05.01.2011 that is after the cheque for the alleged loan was given. Similarly certain disputes regarding encroachment on a temple property has been shown to have been filed against the petitioner and some other persons, this also does not persuade this Court to accept the contention of the learned counsel for the petitioner that the petitioner has been able to rebut the presumption. Further the judgments of the Courts below do not reflect that this argument was raised there and this Court is not inclined to interfere on the ground that the loan transactions as alleged by the complainant is false.

12. Two courts below have after analyzing the facts come to the conclusion that the initial burden casted against the petitioner has not been discharged. This Court is in agreement with the view of the two courts below.

13. Accordingly the revision petition is dismissed along with the pending application.

**SUBRAMONIUM PRASAD, J.**

**JUNE 25, 2021**

*Rahul*