

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.897 of 2018

Arising Out of PS. Case No.-1557 Year-2012 Thana- MUZZFARPUR COMPLAINT CASE
District- Muzaffarpur

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Umesh Kumar Rajak @ Dr. Umesh Kumar Rajak S/o Late Satish Rajak
Resident of Mohalla- Bhikhanpura, Jivandip Clinic Uma Nagar, P.S.-
Ahiyapur, District- Muzaffarpur.

... .. Petitioner

Versus

1. The State of Bihar
2. Ajit Kumar, S/o Sri Shyam Sundar Prasad Sinha Partner Utsav Drag Enterprises, Imlichatti, Muzaffarpur Resident of Mohalla- Balughat, P.S.- Town, District- Muzaffarpur.

... .. Respondents

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Appearance :

For the Petitioner	:	Mr.Sanjay Kumar @ S.K., Advocate
For the State	:	Mr.Narendra Kumar Singh, APP
For the O.P. No. 2	:	Mr. Prakash Chandra, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
C.A.V. JUDGMENT

Date : 08-09-2022

This revision application has been preferred for setting aside the judgment dated 02.05.2018/03.05.2018 passed by learned 2nd Additional District & Sessions Judge, Muzaffarpur in Cr. Appeal No. 87/2017 whereby and whereunder the learned Judge has been pleased to dismiss the said criminal appeal and refused to interfere with the judgment of conviction and sentence dated 25.08.2017 passed by learned Additional Chief Judicial Magistrate (East), Muzaffarpur in complaint case no. C-1557/12. By the impugned judgment and order the petitioner has been convicted under Section 138 of the Negotiable Instrument Act (hereinafter referred to as the “N.I. Act”) and the learned



court has directed the petitioner to pay double of the original amount of the cheque (3,47,000) and to undergo one year simple imprisonment. The period gone under the judicial custody will be set off under Section 428 of the Cr.P.C.

Brief facts of the case

2. The complainant–opposite party no. 2 filed a complaint case on 11.06.2012 for the offences alleged under Sections 403, 406, 420 & 120B I.P.C. and 138 of the N.I. Act. The learned Magistrate, however vide his order dated 28.01.2014 took cognizance only under Section 138 of the N.I. Act.

(i) According to the complainant the accused-petitioner is running a nursing home namely, Jivandeep Clinic. He had taken medicines from the complainant who is running Utsav Drug Enterprises at Imlichatti. It is alleged that the medicines were purchased on credit basis for a sum of Rs. 3,47,180/- on 08.10.2011. The complainant claimed that the accused-petitioner, in order to pay the said outstanding amount issued a cheque of Rs. 3,47,000/- on 25.04.2012 in favour of the complainant-opposite party no. 2 but on presentation of the cheque the same stood dishonoured for want of sufficient funds in the account of the accused-petitioner. The complainant further



claimed that he sent a legal notice to the accused-petitioner but the payment was not made.

(ii) In this case charge was framed under Section 138 of the N.I. Act and the prosecution examined three witnesses. C.W.1 is the complainant himself whereas C.W.2 and C.W.3 are the medical representative and employee of the medicine company. The accused-petitioner was examined under Section 313 Cr.P.C. in which he pleaded innocence and denied the allegations. No defence witness has been produced.

(iii) The learned Magistrate examined the evidences on the record and held the petitioner guilty for the offence under Section 138 of the N.I. Act.

(iv) In the appellate court a plea was taken on behalf of the accused-petitioner that no legal notice was sent demanding the amount under the cheque. In this connection, the attention of the appellate court was drawn towards paragraph '11' of the cross examination of the complainant-opposite party no. 2 wherein the complainant has admitted that he had not sent notice for payment. The appellate court held that the complainant was not asked as to whether he had sent legal notice or not. The question put to him was as to whether notice for payment has been sent or not which he replied by saying that



he had not sent any notice for payment. The appellate court observed that the copy of legal notice and the postal receipt are available on the record. Those were not exhibited but the learned court is taking judicial notice of the same and is being considered. The appellate court, therefore, refused to interfere with the judgment of the learned trial court.

3. In this Court, learned counsel for the accused-petitioner has reiterated the plea of non-service of notice. The following two grounds have been urged:

(1) that in this case the complainant did not serve any demand notice calling upon the petitioner to make payment of the amount under the dishonoured cheque, hence, the essential requirement to maintain a complaint is missing; and

(2) that the petitioner being an accused has discharged the initial burden by preponderance of possibility that the cheque in question was issued as 'security' against the future supply of medicines but no medicine was supplied to the petitioner. Under such circumstances, the presumption under Section 138 of the N.I. Act being rebuttable will not come in aid of the prosecution and it was incumbent upon the complainant-opposite party no.2 in this case to prove by placing on record material evidences that medicines were duly supplied to the



petitioner and the cheque was issued for payment against the said supply.

4. Learned counsel for the petitioner has drawn the attention of this Court towards the deposition of the complainant witness No. 1 (paragraph '16') wherein the defence suggested this witness that no medicine was supplied to the accused and the cheque had been misused and that there is no outstanding against the petitioner which the complainant witness no. 1 had denied. Further in paragraph '10' of the evidence of C.W.2, his attention was drawn on behalf of the defence that no medicine was supplied to the accused and the cheque was issued towards security only.

5. Learned counsel for the petitioner has relied upon the following three judgments (i) **Parveen Mehta Versus Vishal Joshi (CRM-A-1997-MA-2015) (Hon'ble Punjab and Haryana High Court at Chandigarh)** (ii) **Vijay Versus Laxman & Anr. Reported in (2013) 3 SCC 86** and (iii) **Raj Kumari Jawa Versus Parmod Kumar reported in 2015 SCC online P&H 7452** to submit that one of the ingredients for succeeding under Section 138 of the N.I. Act is that the cheque was issued for discharge of debt or other liability. It was held that the undisputed signature of the respondent on the cheque in



itself is not sufficient for conviction and the respondent was successful in rebutting the presumptions raised against him under Section 139 of the N.I. Act but the appellant had failed to discharge the onus casted upon him. In the case of **Vijay** (supra) it was held that so long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case.

6. On behalf of the complainant-opposite party no. 2, it is submitted that the demand notice was though sent by post but in course of evidence it could not be duly exhibited, but learned counsel submits that non-service of notice would not be fatal to the case of the complainant-opposite party no. 2. He relies upon the judgment of the Hon'ble Supreme Court in the case of **C.C. Alavi Haji v. Palapetty Muhammed and Anr** reported in **2007 AIR SCW 3578**.

7. Learned counsel for the complainant-opposite party no. 2 admits that in course of evidence the complainant said that he can produce the bills/invoices of the medicines which were supplied to the accused-petitioner but those bills/invoices or any other document showing supply of medicines to the accused-petitioner was not proved. It is, however, submitted that the



complainant - O.P. No.2 has prima-facie shown that the cheque was issued against supply of medicine and in course of cross-examination of the complainant the defence has not extracted any statement so as to disbelieve the case of the complainant.

8. Learned counsel for the complainant – O.P. No.2 submits that Section 139 of the N.I. Act raises a presumption in favour of the complainant-opposite party no. 2 and in this case presumption would be that the cheque was issued against the supply of medicines. It is his submission that the accused-petitioner has failed to discharge his burden to dislodge the presumption under Section 139 of the N.I. Act. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Kishan Rao v. Shankargouda** reported in **AIR 2018 Supreme Court 3173**.

9. Learned counsel further submits that in this case non-marking of the legal notice and the postal receipt as exhibits would not be fatal the complainant's case.

Consideration

10. Heard learned counsel for the parties and perused the records. This Court finds that in the facts of the present case, it is an admitted position that the accused-petitioner had issued the cheque in question (Exhibit '1') and the same stood



dishonoured on presentation which is evident from the certificate issued by the Andhara Bank on 05.05.2012 (Exhibit '2'). The complainant -opposite party no. 2 deposed as C.W.1. He has stated in his examination in chief that the cheque stood dishonoured in want of funds in the account of the accused - petitioner. He has further stated that a legal notice was given. The appellate court rightly pointed out in course of his cross-examination a vague question was asked as to whether any notice for payment was given. The accused-petitioner did not show enough courage to ask specific question as to the legal notice. No suggestion was given to this witness that he had not sent any legal notice for payment.

11. The complainant-opposite party no. 2 submits that non-exhibiting of the legal notice will not prove fatal for the complainant in view of the judgment of the Hon'ble Supreme Court in the case of **C.C. Alavi Haji** (supra). In the case of **C.C. Alavi Haji** (supra) a question pertaining to service of notice in terms of clause (b) of proviso to Section 138 of the N.I. Act came up for consideration. The Hon'ble Supreme Court examined Section 138 to 142 of the N.I. Act. For purpose of the present case it would be important to take note of paragraph '17' of the judgment which reads as under:

"17. It is also to be borne in mind that the requirement of



giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran's case (supra), if the giving of notice in the context of Clause (b) of the proviso was the same as the 'receipt of notice' a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

12. In the said case the complainant had issued lawyer's notice intimating the dishonour of cheque and demanded payment on 04.08.2001, the same was returned on 10.08.2001 saying that the accused was out of station. There was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by registered post



acknowledgment due. But the returned envelope was annexed to the complaint and it formed a part of the complaint which showed that the notice was sent by a registered post acknowledgment due to the correct address and was returned with an endorsement that the addressee was abroad. The Hon'ble Supreme Court took a view that in facts in hand the requirement of Section 138 N.I. Act had been sufficiently complied with.

13. To me, it appears that the ratio of the judgment of the Hon'ble Supreme Court in the case of **C.C. Alavi Haji** (supra) would equally apply in the facts of the present case. It is evident from the records that C.W.1 had stated in his examination in chief that legal notice was given. The copy of legal notice and the postal receipts were found available on the record.

14. While answering the suggestion of the defence in paragraph '11' C.W.1 has stated that notice for payment was not given to the accused. This Court is inclined to accept the view of the learned Appellate Court that the defence did not specifically ask about giving of legal notice. This Court further finds that in paragraph '14' when the C.W.1 was asked as to the date of receipt of notice by the accused-petitioner he said that he was



not aware of the same. Again, this Court finds that there was no suggestion from the defence that no legal notice was sent by the complainant-opposite party no. 2. Further assuming that no legal notice was received by the accused-petitioner, he could have made payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons, and, therefore, the complaint is liable to be rejected. The accused-petitioner failed to do so. This Court, therefore comes to a conclusion that the ground taken by the accused-petitioner as to non-service of notice would fail.

Presumption under Section 139 N.I. Act

15. In case of **Praveen Mehta** (supra), the respondent took a defence that security cheque was misused. A loan of Rs. 5,000/- was taken by the complainant which was repaid but the cheque was not returned. By filling the amount of Rs. 85,000/-, the security cheque was presented in the bank. To substantiate the defence, the respondent relied upon the testimony of the official of Income Tax Department and the income-tax returns filed by the complainant. Further evidence was adduced to show that the complainant was acting as a money lender and he had filed number of complaints under Section 138 of the Act by misutilizing the security cheques and if the amounts lended by him



on loan are compared with his earnings in the income-tax returns, the amount advanced as loan were much higher. The trial Court, thus concluded that the respondent was able to rebut the presumptions under Section 139 of the Act and the complainant failed to discharge the onus that the cheque was issued in discharge of debt or other liability and acquitted the respondent.

16. While answering the issue raised in the said case the Hon'ble High Court took note of the Judgment of Hon'ble Apex Court in the Case of **Vijay v. Laxman and Anr.** Reported in **2013 (2) JT 562** and **Dashrath Rupsingh Rathod v. State of Maharashtra and Anr (Criminal Appeal No. 2287 of 2009)** which are reproduced hereunder:

“We are not unmindful of the fact that there is a presumption that the issue of a cheque is for consideration. Section 138 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. It is trite that the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently rebutted.



The legal position regarding the standard of proof required for rebutting a presumption is fairly well settled by a long line of decisions of this Court.”

In the case of **Dashrath Rupsingh Rathod (supra):**

“31. To sum up:

(i) An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

(ii) Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.

(iii) The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if
(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque and

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

(iv) The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

(v) The proviso to Section 138 simply postpones/defers



institution of criminal proceedings and taking of cognizance by the Court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

(vi) Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.

(vii) The general rule stipulated under Section 177 Cr.P.C. applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Section 184 and 220 thereof.”

17. In the case of **Raj Kumari Jawa (supra)** the Hon’ble Punjab and Haryana High Court was considering an application seeking grant of Special Leave to Appeal against the order passed by the learned Judicial Magistrate, 1st Class, Karnal whereby the accused-respondent had been acquitted in a complaint filed under Section 138 of the N.I. Act. The Hon’ble High Court noticed that the accused-petitioner had been successful in elucidating sufficient material from the evidence of the complainant to discharge the initial onus placed upon him



and accordingly the onus was shifted upon the complainant to prove her case beyond all shadows of reasonable doubt. In the said case the accused had specifically denied his liability towards the complainant. The complainant had stated in the complaint petition that accused was on business terms with the complainant and used to borrow money from time to time, whereas during cross examination she deposed that she was not running any business and had no knowledge regarding the business of the accused. It was further mentioned in the complaint that as per the accounts, the accused was liable to pay Rs. 2,00,000/- to the complainant till date whereas during cross examination she could not even tell a single instance when the accused borrowed money from her.

18. In the aforesaid background the Hon'ble Division Bench took a view that once the debt/liability had been disputed by the accused and the existence of the account books had been admitted by the complainant, then the complainant was required to produce books of account maintained by her in ordinary course of business. The Hon'ble Court found that there were contradictions in the averments of the complainant and evidence led by the complainant. The complainant had given to diametrically opposite versions and the averment of the



complainant had been proved to be false by the testimony of the complainant herself which had in turn shattered the entire case. In this background it was taken that the accused had been able to rebut the presumptions raised under Section 139 of the N.I. Act.

19. This Court finds that in the case of **Raj Kumari Jawa (supra)** considering the diametrically opposite version of the complainant in her complaint and the deposition it was held that she had failed to prove her case beyond all reasonable doubts and the accused was acquitted. The Hon'ble Division Bench relied upon the judgment of Hon'ble Apex Court in the case of **Ashok Kumar Vs. State of Rajasthan** reported in **(1991) 1 SCC 166** wherein it has been held that interference in an appeal against acquittal should be called for only if the judgment under appeal is perverse or is based on misreading of evidence. The Hon'ble Court refused to interfere with the judgment of acquittal.

20. This Court is of the considered opinion that the plea taken by the accused-petitioner that he had discharged his initial burden by preponderance of possibility that the cheque in question was issued as 'security' against future supply of medicine is required to be examined on the basis of the



materials on the record. The accused-petitioner has not led any evidence to show that he had issued any supply order to the complainant-opposite party no. 2 for future supply. The rebuttal of presumption has been sought to be proved from the deposition of the complainant and his witnesses by pointing out that the complainant – opposite party no. 2 though states that he can produce the bill/invoice showing supply of medicine to the accused but the same have not been brought on record and further that the accused -petitioner has denied his liability to pay any debt or liability.

21. On a careful perusal of the evidence of the complainant and his witnesses this court finds that the accused-petitioner does not question the assertion of the complainant-opposite party no. 2 that the petitioner runs a nursing home at a distance of 4 K.M. from the medicine shop of the complainant-opposite party no. 2. The complainant has stated that there was no contract between the accused and the complainant for sale of medicines, thus it is not his case that he was having a running business with the accused-petitioner and that a books of account had been maintained in respect of accused-petitioner. He has stated that he had handed over the original receipt to the accused at the time of receiving the cheque. In the whole evidence of the



complainant and his witnesses the accused-petitioner has not made any suggestion as to how and in what context he had issued the cheque in favour of the petitioner. The accused-petitioner claims that it was given as security against future supply that is nothing but a bald assertion of the accused-petitioner by way of submissions. While cross examining the complainant in paragraph '16' it was suggested by the defence that in the name of supply of medicines by way of security the signature of the accused was taken on the cheque but no medicine was supplied. This suggest that the accused-petitioner had approached the complainant for purchase of medicine and the cheque was issued towards payment of the cost of medicine. The presumption under Section 139 of N.I. Act only gets strengthen at this point. The case of the defence, in absence of any prima-facie material does not satisfy the test of rebuttal of presumption. While it is true that the standard of proof required for rebutting a presumption under Section 139 of the N.I. Act is not as high as that required of the prosecution, the accused is definitely required to make his version reasonably probable. In the case of **Vijay (supra)** the Hon'ble Supreme Court has held that whether or not it is so in a given case depends upon the facts and circumstances of that case.



22. To this Court, it appears that the accused-petitioner failed to make out a reasonably probable case showing that the cheque in question was issued as a security and the same has been misused. The second ground taken on behalf of the accused-petitioner shall also fail.

23. Sitting in the revisional jurisdiction, this Court finds no reason to interfere with the concurrent findings of the learned court below as no perversity may be found with the judgments under revision.

24. This revision application is, thus, dismissed.

25. The petitioner shall surrender within a period of 30 days from today in the learned court below.

(Rajeev Ranjan Prasad, J.)

Rajeev/-

AFR/NAFR	
CAV DATE	24.08.2022
Uploading Date	08.09.2022
Transmission Date	08.09.2022

Note: The ordersheet duly signed has been attached with the record. However, in view of the present arrangements, during Pandemic period all concerned shall act on the basis of the copy of the order uploaded on the High Court website under the heading 'Judicial Orders Passed During The Pandemic Period'.

