IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 428 of 2015

Environ Energy – Tech Service Ltd.

Vs.

The State of West Bengal & Ors.

For Amicas Curiae : Ms. Rita Dutta.

For the State : Ms. Puspita Saha.

Heard on : 11.11.2022

Judgment on : 22.11.2022

<u>Shampa Dutt (Paul), J.:</u>

The Appeal is against a Judgment and order of **acquittal** dated 30.03.2015 passed by the Learned Judicial Magistrate, 4th Court, Alipore, South 24 Parganas, in AC – 3120 of 2009.

The Appellant/Complainant's Case is that the accused/respondents in discharge of their liability, had issued an Account Payee Cheque bearing Cheque No. 102631 dated 07-09-2009, for Rs. 1,10,980/-, drawn on United Bank of India, Kali Temple Road Branch Kolkata – 700 026 in favour of the Appellant/Complainant, which was duly signed and sealed by the accused/opposite party nos. 3 and 4.

The Cheque was deposited with United Bank of India, Thakurpukur Branch, banker of the Complainant/Appellant company, on 07-09-2009 for encashment but was returned dishonoured with the endorsement "Fund Insufficient" vide Cheque Return Memo dated 09-09-2009.

Upon receipt of such information regarding dishonour of the aforesaid cheque, the complainant/Appellant served a Demand Notice as per Proviso (b) to Section 138 of the Negotiable Instrument Act, 1881, upon all the accused persons by registered post with acknowledgement due on 23-09-2009 through their Learned Advocate .

On 03.11.2009 the Learned Advocate for the Complainant/Petitioner received a registered letter dated 30-10-2009 from one Subrata Guhathakurta, Advocate for the accused /respondents where in he categorically refused to pay any amount and denied any liability with the Complainant /Appellant.

It is the contention of the Complainant/Appellant that the accused/respondents have failed and/or neglected to repay the demanded amount by sending an Advocate's letter dated 30-20-2009 and have willfully committed an offence under Section 138 of the Negotiable Instrument Act, 1881 (as amended up to date).

The Learned Chief Judicial Magistrate, Alipore, upon receipt of the aforesaid petition of complaint in connection with Case No. AC-3120 of 2009, was pleased to take cognizance of the offence and transferred the case to the file of the Learned Judicial Magistrate, 4th Court, Alipore, for enquiry and disposal.

On completion of trial, the trial court vide his judgment and order dated 26.03.2015 the accused persons were found not guilty and thus acquitted from the said case.

Hence this appeal.

Ms. Rita Dutta Learned Amicus Curies submits that the impugned judgment is an abuse of the process of court and against the principle of Natural Justice. There was no application of mind by the Learned Magistrate who also failed to appreciate the facts and circumstances in the proper perspective

The scope of Section 139 of the Negotiable Instrument Act has not been properly interpreted therein. Presumption is in favour of the Holder of the cheque and that such cheque had been issued in discharge of legal debt and/or liability unless proved otherwise by the accused.

The Learned Trial Court failed to appreciate that the accused persons failed to adduce any evidence to discharge the onus placed upon them by the presumption in law available under section 139 of the Negotiable Instruments Act. Besides making a general denial of the fact that the cheque had been issued in discharge of legal debt and/or liability, the defence failed to adduce any evidence to rebut the presumption nor did it make out a case citing the reason for which the cheque can be held to have not been issued in discharge of legal debt and/or liability. In such circumstances, the Learned Trial Court, by considering the legal presumption available under Section 139 of the Negotiable Instruments Act to have been rebutted merely on denial made by the accused/respondents, has clearly failed to appreciate the scope and purport of section 139 of the Negotiable Instruments Act. The impugned order of acquittal is thus erroneous in law as also in facts and is thus liable to be set aside.

The Learned Trial Court, by erroneously holding such mere denial adopted by the defence to be sufficient rebuttal of the presumption available under Section 139 of the Negotiable Instrument Act, has caused grave error in law.

The Learned Trial Court, while acquitting the accused persons/respondents, had also held that the service of demand notice upon the respondent nos. 2 and 4 have not been proved. The Learned Court failed to take into its consideration the provisions of Section 27 of the General Clauses Act. The defence has not tried to rebut such presumption.

The Learned Trial Court failed to appreciate that mens rea was not a required ingredient of the offence under Section 138 of the Negotiable Instruments Act.

The Learned Magistrate clearly failed to appreciate that the cheque in question was issued by the opposite party No. 2 and thus, for initiation of prosecution against the drawer of the cheque, the complainant company was under no requirement for invoking Section 141 of the Negotiable Instruments Act.

The impugned judgment and order is bad in law and hence the same is liable to be set aside.

Ms. Puspita Saha, Learned Advocate for State submits that considering the materials and evidence on record, necessary orders may be passed by this court.

Evidence on record

The only witness for the complainant before the trial court is prosecution witness no. 1, Subrata Kumar Mitra. He has reiterated the Complainants case. The service of demand notice in this case has been proved by exhibits, which is the reply by the accused persons against the Demand Notice dated 23.09.2009 (Exhibit 4)

On being cross examined, this witness has deposed that it is true that why the alleged cheque has been issued by the accused has not been mentioned in the Demand Notice as well as in the petition of Complaint. He has further admitted that no documents were filed to show the liabity of the accused persons.

Analysis of Evidence

The Learned Magistrate in his Judgment under appeal held that the accused persons in their reply to the demand notice, denied (general denial) that the disputed cheque was issued in discharge of liability and it was the defence case that there was no such legally enforceable debt and liability and that the cheque has been obtained and presented by misrepresentation. The Learned Magistrate also held:-

"The evidence of the complainant even did not divulge any such evidence, as to why the cheque, Exhibit-3 was issued by the accused? Whether there was any such debts or liability or the accused company or the accused has rendered any such services from the complainant? What is the real purpose of issuing the cheque?"

Evidence on record shows that the cheque was dishonoured on 08.09.2009. The demand notice is dated 23.09.2009. The reply by the accused is dated 30.09.2009.

All these communications are within the prescribed period as per provision of the Negotiable Instrument Act.

The next point agitated by the accuseds before the trial court is that they have not given any cheque and they have no liability to honour the same.

Admittedly (evidence of p.w.l), it has not been mentioned in the Demand Notice and also in the petition of complaint as to why the disputed cheque has been issued by the accused.

The Learned Magistrate while deciding this issue held :-

> *"In this regard I feel tempted to cite the Judgment of Hon'ble Apex Court in (2014) C.Cr.LR (SC) 518 John k. Abraham V/S Simon C. Abraham & Anr. Wherein Hon'ble Court was pleased to observe that "it has to be stated that in order to draw the presumption under section 118 read along with section 139 if the Negotiable Instrument Act, the burden was heavily upon the complainant to have shown that he had the required funds for having advanced the money to the accused that the issuance of the cheque in support of the said payment advance was true and that*

the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant." [Emphasis given by me] therefore from the observation of the Hon'ble Court the burden is upon the complainant to show that he have advanced some money of services for which and in discharge of the same the accuseds had issued the cheque".

Section 139 of the Negotiable Instrument Act :-

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.*

This Section raises presumption of law that cheque duly drawn was in discharge of debt or liability. However, presumption is rebuttable and onus lies on drawer to rebut it by adducing cogent evidence to the contrary. This presumption is not in conflict with human right of presumption of innocence of accused which prosecution is required to dislodge by proving its case against accused beyond reasonable doubt, **Bir Singh v. Mukesh Kumar, (2019) 4 SSC 197.**

Burden of rebuttal of presumption. –

The presumption mandated by Section 139, does indeed include the existence of a legally enforceable debt or liability. Bare denial of the passing of the consideration and existence of debt, is not enough to rebut the presumption. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complaint in a criminal trial. Rather, 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 consideration did not exist, 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. 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 Section 118 and 139 of the NI Act**, Uttam Ram v. Devinder Singh Hudan,(2019) 10 SSC 287**.

The Supreme Court in **Criminal Appeal No (s) – 292 of 2021, Sumeti VIJ Vs M/S PARAMOUNT TECH FAB INDUSTRIES, on 09th March 2021** relied on several precedents and observed :-

> *"The object of introducing Section 138 and other provision s of Chapter XVII in the Act appears to be to enhance the acceptability of cheques in the*

settlement of liabilities. The drawer of the cheque be held liable to prosecution on dishonour of cheque with safeguards provided to prevent harassment of honest drawers. Section 138 primarily relates to a civil wrong and the amendment made in the year 2000 specifically made it 8 WWW.LIVELAW.IN LL 2021 SC 149 compoundable. The burden of proof was on the accused in view of presumption under Section 139 of the Act and the standard of proof was of "preponderance of probabilities". The N.I. Act including a cheque carrying a presumption of consideration in terms of Sections 118(a) and 139 of the Act which is related to the purpose referred to and reads as under:¬

***"118 Presumptions as to negotiable instruments**. —*

Until the contrary is proved, the following presumptions shall be made:— (a) of consideration — that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

* * * * *

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." 14. There is a mandate of presumption of consideration in *terms of the provisions of the Act and the onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act, which reads as under:¬ **"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 9 WWW.LIVELAW.IN LL 2021 SC 149 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 8 [a term which may be extended to two years'], or with fine which may extend to 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. Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability." 15. The scope of Section 139 of the Act is that when an accused has to rebut the presumption, the standard of proof for doing so is that of "preponderance or probabilities" which has been examined by a three-Judge Bench of this Court in Rangappa vs. Sri Mohan3 , which reads as under:¬ 3 (2010) 11 SCC 441 10 WWW.LIVELAW.IN LL 2021 SC 149 "**26.** In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. **27**. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments.*

While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof."

16. *It is well settled that the proceedings under Section 138 of the Act are quasi-criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.*

17*. Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the 11 WWW.LIVELAW.IN LL 2021 SC 149 accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved. In Rohitbhai Jivanlal Patel vs. State of Gujarat and Another4 , this Court has examined the scope of Sections 138 and 139 of the Act, which reads 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 fulfill 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] 4 (2019) 18 SCC 106 12 WWW.LIVELAW.IN LL 2021 SC 149*** *"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 nonexistence 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."*

In the present case, the Complainant has only sent a demand Notice on the Cheque being dishonoured. There is nothing in either the petition of complaint or in the demand notice stating any facts leading to the issuance of the cheque. The accuseds have only denied their liability. No evidence has been adduced either oral or documentary regarding the cheque being issued in discharge of liability.

But the presumption as per Section 139 N. I. Act is in favour of the Complainant. The accused persons did not rebut the presumption in any manner whatsoever. **There is no statement by either the complainant or the accused persons as to why the cheque had been issued and for what purpose**.

Conclusion:-

Thus the findings of the Learned Magistrate is clearly against the provisions of Section 139 of the N.I. Act and thus not in accordance with law.

Considering the fact that admittedly none of the parties have any pleadings or evidence relating to the cheque being issued in discharge of debt or liabity, and presumption under Section 139 N.I. Act going in favour of the complainant (though neither any pleadings nor any documents have been filed by the complainant) the principal of Natural Justice requires that the **complaint case be remanded back to the trial court for retrial.**

The Learned Magistrate will issue notice upon both sides and allow the parties to adduce fresh evidence in respect of the presumption under Section 139 N.I. Act and permit necessary amendment if necessary for proper adjudication and also provide sufficient opportunity to the accused /opposite parties to rebut the said presumption. And on consideration of the fresh materials on record including the evidence, decide the case a fresh and pass a Judgment in accordance with law **within six months** from date of communication of this order.

Accordingly the Judgment / Order under Appeal dated 30.03.2015 passed in AC – 3120 of 2009 by the Learned Judicial Magistrate, 4th Court, Alipore, is here by set aside.

Let a copy of this Order/Judgment be sent to the trial court along with the lower court records for information and necessary Action.

CRA 428 of 2015 is accordingly disposed of.

Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)