

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 559 of 2019

M/S RAHUL ENTERPRISE
VS.
M/S A.B. CONSTRUCTION & ANR.

For the Petitioner : Mr. Kazi Safiullah, Adv.

For the Opposite Parties : Mr. Jayanta Narayan Chatterjee, Adv.,
Ms. Moumita Pandit, Adv.,
Ms. Jayashree Patra, Adv.,
Ms. Sreeparna Ghosh, Adv.,
Ms. Ritashree Banerjee, Adv.,
Ms. Dipanwita Das, Adv.

Hearing concluded on : 15th September, 2022

Judgement on : 19th September, 2022

Siddhartha Roy Chowdhury, J:-

1. This is an appeal with Special Leave of the Court and challenge in this appeal is to the judgement of acquittal passed by learned Chief Judicial Magistrate, Malda in Case No. 600C/2003 on 17th December, 2017.
2. Briefly stated, Subhrangshu Das, the proprietor of M/s Rahul Enterprise filed a petition of complaint before the learned Chief Judicial Magistrate, Malda under Section 138 of the Negotiable Instrument Act against M/s A.B. Construction being represented by its

proprietor Ajay Basu contending, inter alia, that in discharge of the liability in connection with the purchase of a tractor by a party, the accused person issued a cheque of Rs. 3,23,600/- in favour of the complainant drawn on Oriental Bank of Commerce which was presented to Punjab National Bank, Malda Branch. The cheque was returned with the endorsement "payment stopped by the borrower". The complainant then issued a notice calling upon the accused person to pay the said amount. Despite receipt of notice the accused person refused to act in terms of the notice. Hence, petition of complaint was filed and learned Trial Court having found prima facie case issued process under Section 138 of the Negotiable Instrument Act. Accused person upon receipt of such notice surrendered to the jurisdiction of learned Trial Court. He was examined under Section 251 of the Cr.P.C. and pleading innocence he claimed to be tried.

3. This case has chequered history. Earlier the petition of complaint was disposed of by judgement and order of conviction passed by learned Chief Judicial Magistrate, Malda on 19th June, 2011. Said judgement was challenged in an appeal before the learned Additional District and Sessions Judge, 5th Court, Malda. Learned Appellate Court was pleased to set aside the judgement and order of conviction passed by learned Trial Court. The complainant challenged that order of the Appellate Court before this Hon'ble Court being CRA 504 of 2013 and the Co-ordinate Bench of this Court was pleased to set aside the judgement passed in the Criminal Appeal No. 7 of 2014 by learned Additional District and Sessions Judge, 5th Court, Malda and sent back

the case on remand, with the direction upon the learned Trial Court to allow the complainant to lead further evidence to prove that Subhrangshu Das is the sole proprietor of the appellant. Pursuant to that order, the appellant was allowed to adduce evidence and learned Chief Judicial Magistrate, Malda was pleased to pass the judgement impugned after complying with the order passed in CRA 504 of 2013. An order of acquittal was recorded by the learned Trial Court.

4. Kazi Safiullah, learned Advocate representing the appellant strenuously argued that learned Co-ordinate Bench while passing the judgement in Criminal Appeal No. 504 of 2013 was pleased to send back the case on remand to decide a very short issue as to the status of the Subhrangshu Das as proprietor of the appellant M/s Rahul Enterprise. Therefore, learned Trial Court had no jurisdiction to decide the issues already answered in favour of the appellant, and by necessary implication affirmed by the Co-ordinate Bench of this Hon'ble Court in the earlier judgement. The judgement impugned is therefore perverse and should be set aside.

5. In my humble opinion, when the case was sent back on remand with the direction upon the learned Trial Court to permit the appellant to lead further evidence to decide the issue regarding status of Subhrangshu Das as the sole proprietor of the appellant company after setting aside the impugned judgement passed in Criminal Appeal No. 7 of 2014, there is no reason to hold that learned Trial Court transgressed his jurisdiction by passing the impugned judgement upon appreciation of the evidence on record. It was virtually an open remand

and learned Trial Court was under obligation to decide all the points required to adjudicate a proceeding under Section 138 of the N.I. Act, after complying with the direction given in CRA 504 of 2013. I am not inclined to imbibe myself with the view expressed by Kazi Safiullah, learned Counsel for the appellant.

6. This is a case under Section 138 of the N.I. Act and it is trite to say that to crown success in such a proceeding complaint is to prove the following ingredients:-

- (a) Cheque was issued; and issued in discharge of liability of the drawer.
- (b) Same was presented;
- (c) It was dishonoured;
- (d) A notice in terms of Section 138 N.I. Act was served;
- (e) Despite service of notice, no payment was made.

7. Hon'ble Supreme Court (pronounced) in **JUGESH SAHGAL VS. SHAMSHER SINGH GOGI** reported in **(2009) 14 SCC 683** held:-

“8. It is true that [Section 138](#) of the Act was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing cheque, have no intention of really doing so, yet to fasten a criminal liability under the said provision, necessary ingredients of the Section are to be satisfied. [Section 138](#) of the Act reads as follows:

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 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."

9. It is manifest that to constitute an offence under [Section 138](#) of the Act, the following ingredients are required to be fulfilled:

- (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;*
 - (ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;*
 - (iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;*
 - (iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;*
 - (v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;*
 - (vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;*
- 10. Being cumulative, it is only when all the afore-mentioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under [Section 138](#) of the Act.”*

8. In **M. S. NARAYAN MENON VS. STATE OF KERALA** reported in **(2006) 6 SCC 39**, Hon’ble Supreme Court held that the presumptions under Sections 118 (a) and 139 of the Act are rebuttal and the standard of proof required for such rebuttable is preponderance of

probabilities and not proof beyond reasonable doubt. The Hon'ble Court observed:-

“In terms of [Section 4](#) of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in [Section 3](#) of the Evidence Act.

Applying the said definitions of 'proved' or 'disproved' to principle behind [Section 118\(a\)](#) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defense. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies.”

9. Upon perusal materials on record I find that English Bazar Police Station Case No. 220 of 2003 was registered pursuant to information given by the owner of the appellant Enterprise. The document has been admitted as Exhibit-D. From the said document I find that the cheque in question was given to the informant by Ajit Sinha of Mourya Finance Company Limited, which is contrary to the claim of the appellant in this case that cheque was given by Ajay Basu of A.B. Construction.

10. Though the appellant asserted that A.B. Construction is the sister concern of Mourya Finance Company Limited but failed to substantiate the averment by any cogent evidence.
11. It is fact that the proprietor A.B. Construction Ajay Basu was the drawer of the cheque in question and on his instruction Bank did not honour the cheque.
12. Prima facie this fact is sufficient to saddle Ajay Basu the proprietor of A.B. Construction with the criminal liability within the meaning of Section 138 of the N.I. Act.
13. As is held by Hon'ble Supreme Court in M.S. Narayan Menon (supra) the presumption arising out of Section 118 (a) and 139 of the N.I. Act are rebuttable and of course the onus to rebut the presumption lies with the respondent, who has been arrayed as an accused. The question that calls for consideration in this matter is whether the accused person had any obligation to pay any debt which is otherwise legally enforceable.
14. Here in this case as I have already pointed out, over the self-same issue on the basis of information given by Subhrangshu Das on 30th June, 2003, English Bazaar P.S. Case No. 220/2003 was registered on 30th June, 2003 and in the said information Subhrangshu Das stated that one Ajit Sinha is the owner of Mourya Finance Company Limited. Complainant took one Taseruddin son of late Faijuddin Sk. who intended to purchase a tractor from the complainant on hire purchase, financed by Mourya Agency. Taseruddin paid Rs. 71,000/- to the complainant out of which he paid a sum of Rs. 64,000/- to Ajit Sinha

the owner of Mourya Finance Company Limited and it was Ajit Sinha who handed over the cheque in question drawn on Oriental Bank of Commerce by A.B. Construction owned by Ajay Basu.

15. Ajay Basu the proprietor of A.B. Construction adduced evidence as DW-2 and stated that he was working for gain as Manager for Mourya Finance Company. His employer obtained blank cheque while giving him employment as a security. The said cheque was illegally used by the owner of Mourya Finance Company Limited, Sri Ajit Sinha.
16. It appears from the available document, Exhibit-E that the vehicle in question was registered in the name of Tinkori Mandal on 6th August, 2003 and the vehicle was acquired on hire purchase with the financial assistance from Malda Co-operative Agricultural Bank Limited.
17. In absence of any document establishing the nexus between A.B. Construction and Mourya Finance Company Limited, I am of the view that the appellant/complainant has failed to prove that A.B. Construction or Ajay Basu had any obligation to pay to appellant any money and cheque in question was given in discharge of such obligation. On the contrary, accused/respondent was successful in rebutting the presumption arising out of the provision of Section 139 of the Negotiable Instrument Act.
18. The appellant being the complainant had failed to establish by cogent evidence that the accused/respondent issued the cheque in favour of the complainant in discharge of his liability to pay debt

otherwise legally enforceable rather it is established that the cheque was received from Ajit Sinha.

19. Hon'ble Apex Court in the case of **KRISHNA JANARDHAN BHATT VS. DATTATRAYA G. HEGDE** reported in **(2008) 4 SCC 54** held:-

“In India however, subject to the statutory interlooks the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose, the nature of the offense, seriousness as also gravity thereof, may be taken into consideration. The Courts must be on guard to see that merely on application of presumption as contemplated under Section 139 of N.I. Act, same may not lead to injustice or mistaken conviction.”

20. In my humble opinion, the impugned judgement passed by learned Trial Court does not warrant any interference.
21. This appeal against order of acquittal merits no consideration and dismissed however, without costs.
22. Let a copy of the judgement be sent down to Chief Judicial Magistrate, Malda for information and necessary action.
23. Parties to act on server copy duly downloaded.
24. Urgent Photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)