

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 714 of 2018

M/s Tea Arcade

Vs.

Aparna Rai

For the appellant:	Mr. Somopriyo Chowdhury, Adv., Mr. Kausik De, Adv., Ms. Mohini Majumdar, Adv., Mr. Raghav Munshi, Adv.
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For the Respondent:	Mr. Sandipan Ganguly, Sr. Adv., Mr. Dipanjan Dutt, Adv., Mr. Arkadeb Bhattacharya, Adv.
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C.R.A 715 of 2018

M/s Tea Arcade

Vs.

Aparna Rai

For the appellant:	Mr. Somopriyo Chowdhury, Adv., Mr. Kausik De, Adv., Ms. Mohini Majumdar, Adv., Mr. Raghav Munshi, Adv.
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For the Respondent:	Mr. Sandipan Ganguly, Sr. Adv., Mr. Dipanjan Dutt, Adv., Mr. Arkadeb Bhattacharya, Adv.
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Heard on: 12.04.2022, 20.04.2022, 21.04.2022, 11.05.2022

Judgment on: 10.06.2022.

BIBEK CHAUDHURI, J. : –

1. The complainant of Case No.0058948 of 2016 has filed the instant appeal being aggrieved by and dissatisfied with the judgment and order of acquittal passed by the learned Metropolitan Magistrate, 20th Court at Kolkata in a proceeding under Section 138 of the Negotiable Instrument Act (hereinafter described as N.I Act for short).

2. CRA 715 of 2018, is an appeal filed by the complainant of CS 0082901 of 2016 against the judgment and order of acquittal passed by the same court on 24th August, 2018.

3. As both the appeals are between the same party, this Court proposes to dispose of the above numbered two appeals by a composite judgment.

4. In CS 0058948/2016 filed by the appellant against the respondent alleging, inter alia, that for the discharge, in part of existing debt and liability the respondent issued a cheque on 15th December, 2015 for Rs.5 lacks drawn on ICICI Bank, Ballygunge Branch in favour of the complainant. The said cheque was dishonoured due to insufficient fund which was informed by the banker of the complainant, viz, State Bank of India, Park Street Branch on 22nd December, 2015. The complainant issued notice through its learned Advocate for demanding payment of the said amount within the statutory period of time as contained in Section 138(b) of the NI Act. The respondent in spite of receipt of notice failed to make such payment within 15 days thereof. So the complaint was filed by

the complainant, being a partnership firm duly represented by the complainant.

5. CS 0082901 of 2016 is another complaint filed by the same appellant against the identical respondent under Section 138 of the NI Act alleging, inter alia, that in discharge of legally enforceable debt or liability, the respondent issued a cheque for Rs.5 lacks dated 15th March, 2016 drawn on ICICI Bank, Ballygunge Branch in favour of the complainant. The said cheque was however dishonoured on the ground of insufficient fund on 16th March, 2016. Demand notice was issued through the learned Advocate for the appellant on 5th April, 2016. However, the envelopes sent to the accused in her addresses were returned with postal remark "Not Known" on or about 6th April, 2016 which tantamount to good service. The learned Advocate for the appellant wrote a letter to the Director, G.P.O, Kolkata on 2nd May, 2016 requesting him to inform as to whether the notice upon the accused person on her two addresses were served or not. The Director, G.P.O replied on 4th May, 2016 that the envelopes containing demand notice were duly delivered upon the accused on 6th April, 2016. Since the accused failed and neglected to make payment of the amount involved in the cheque the complainant has filed the above numbered complaint.

6. Thus, in the above mentioned two appeals two numbers of cheques dated 15th December, 2015 and 15th March, 2016 were allegedly dishonoured and in spite of service of demand notice, amount involved in

the cheque was not paid by the accused attracting the penal provision of Section 138 of the NI Act.

7. It is pertinent to mention at the outset that the complainant in both the cases is a partnership firm represented by them one Govind Singh Atwal, one of the partners of the said partnership firm. It is also not disputed that the respondents is the proprietor of Everest Business House. It is further ascertained from the evidence on record that the parties deal with the trading business of tea.

8. During trial the accused/respondent took the following defence:-

- (i) The complainant firm being an unregistered partnership firm cannot lodge this complaint in the name of the firm against the accused No.2.
- (ii) One of the partners also cannot initiate a complaint against the accused under Section 138 of the NI Act.
- (iii) The complainant failed to prove any outstanding debt or liability of the accused to the complainant.
- (iv) The cheques in question involved in the aforesaid two cases were not issued by the accused in discharge of lawful debt or liability.

9. The learned Magistrate dismissed both the complaint and recorded an order of acquittal in favour of the respondent on the ground that the complainant failed to establish that the cheques were issued in discharge of any legally enforceable debt or liability.

10. Mr. Somopriyo Chowdhury, learned Advocate for the appellant submits that the trial court correctly held referring to certain decisions that if the cheques stands in the name of a partnership firm, a partner of the said firm can file a complaint and such complaint by an unregistered firm is maintainable as Section 69 of the Partnership Act has no manner of application in a criminal complaint under Section 138 of the NI Act. In this regard, Mr. Chowdhury refers to a judgment of Delhi High Court in **Smt. Rani Kapoor vs. M/s Silvermount** reported in **2017 SCC Online Del 8985**. In the said report the issue as to whether an unregistered partnership firm is entitled to maintain complaint under Section 138 of the NI Act came up for consideration before the Hon'ble Court. The court on due consideration of divergent views expressed by various High Courts finally came to the conclusion placing reliance on **B.S.I Ltd vs. Gift Holding Pvt. Ltd : 2000 SCC (Cri) 538** held that a criminal proceeding is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI act is a penal provision the commission of which offence entails a conviction and sentence of proof of the guilt in duly conducted criminal proceedings. Once the offence under Section 138 is completed, the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability. Therefore, an unregistered firm can maintain a complaint under Section 138 of the NI Act against a defaulting creditor.

11. In **Ganesh Sukhlal Joshi vs. M.A Bharti** reported in **1995 SCC Online Bom 476**, the Bombay High Court held that the complaint by one

of the partners cannot be faulted and when the complaint is filed by one of the partners of the firm, it suffers from no infirmity. In support of his contention that Section 69 of the Partnership Act is not a bar against filing of an application under Section 138 of the NI Act, Mr. Chowdhury refers to a three Judges Bench decision of the High Court of Andhra Pradesh in **Dr. A.V Ramanaiah & Anr. vs. M. Shekhar & Ors.** reported in **2007 SCC OnLine AP 1261**.

12. The learned Advocate for the appellant argued that the learned Magistrate failed to distinguish between liability of a proprietorship firm and the liability of its proprietor. The proprietorship firm has no right to sue or to be sued in its own name but it is the proprietor who is vested with both the rights and liabilities on behalf of the proprietorship firm.

The word “proprietor” and “proprietorship” have been defined in Black’s Law Dictionary, 6th Edition as under:

Proprietor : Owner of proprietorship. One has the legal right or exclusive title to property, business etc. In many instances it is synonymous with owner.

Proprietorship : A business which is owned by a person who has either the legal right and exclusive title, or dominion, or the ownership of that business.

A business, usually incorporated, owned and controlled exclusively by one person. Such a business is commonly designated a “sole proprietorship”.

If the above meaning of proprietor is considered it shows that, proprietor is owner of proprietorship. In instances it is synonymous with owner. Ld. Advocate for the appellant argued that the

appellant had business transaction with Everest Business House and not with Aparna Rai. Both being synonymous therefore Aparna Rai is liable being the sole proprietor.

The learned Advocate for the opposite party argued that the firm was not registered, so the complaint is not maintainable at the instance of one of the partners. It is found from the evidence on record (Ex-2) that the firm is a registered firm dated 10.02.2012. On the date of filing of complaint, it was registered. Even if the firm was unregistered, a complaint under Section 138 N.I. Act is maintainable as Section 69 of the Partnership Act is applicable in civil cases and not in criminal cases.

13. It is further argued by the advocate of the respondent whether consent of other partners are required in filing complaint under Section 138 of the N.I Act. In this case the appellant is one of the partner who admitted in his evidence that he prior to filing of the complaint, did not take consent of the other partner of the firm namely Siddhartha Rai. In **Ganesh Sukhlal Joshi vs. M.A Bharti** reported in **1995 SSC Online Bom 476** it was held that the complaint by one of the partners cannot be faulted and when the complaint is filed by one of the partners of the firm, it suffers from no infirmity.

14. The learned trial court has rightly decided on this point that Section 18 of the Partnership Act provides that partner to be the agent of the firm for the purpose of the business of the firm and any partner is competent

to file a complaint on behalf of the firm. But learned trial court failed to answer if one partner without consent of the other can file a case under Section 138 of the N.I Act. In this case consent of the other partner is not required in filing complaint under Section 138 of the N.I Act. as both partners are jointly and severally liable.

15. The ld. Advocate for the appellant further argued that the learned Magistrate failed to consider that the cheques were issued in discharge of existing liability of proprietorship firm. Under Section 139 read with Section 118 of the N.I Act. the sole and initial responsibility is on the accused to show that the cheque was not issued in discharge of any existing liability. Reliance has been placed by the ld. Advocate for the appellant in **Rangappa vs. Sri Mohan** decided in **(2010) 11 SCC 441**. In Rangappa, the ratio decidendi of **Krishna Janardhan Bhat vs Dattatraya G Hegde : (2008) 4 SCC 54** was considered. The Hon'ble Supreme Court quoted paragraph 29-32 and 34 of Krishna Janardan Bhat. The said paragraphs are reproduced below:

29. Section 138 of the Act has three ingredients viz.:

- (i) that there is a legally enforceable debt;
- (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and
- (iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint

petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is “preponderance of probabilities”. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.

16. Finally the Hon'ble Supreme Court in Rangappa (supra) held in paragraph 26 as hereunder:

“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.”

17. Thus, Krishna Janardhan Bhat case was overruled by Rangappa case. As noted in the above reports, this is of course in the nature of a rebuttable presumption and it is open to the accused/opposite party to raise a defence wherein the existence of a legally enforceable debt or liability can be contested.

18. Coming back to the facts in the present case, the opposite party did not raise a probable defence that there was no existing liability. However the appellant in its affidavit of evidence showed the transactions made in favour of the opposite party. The appellant provided an amount of Rs.75,00,000/- to the opposite party on the request of Sidharth Rai who is one of the partner of the appellant and also husband of the opposite

party to run a business of tea purchase. Assurance was given to repay the amount in installment by 2016 and in the mean time would pay the profit from tea trading. The opposite party refunded an amount of Rs.13,00,000/- in 2013 and Rs.5,00,000/- in 2015. A total of Rs.18,00,000/- out of Rs.75,00,000/- has been paid and Rs.3,53,480/- as commission from profit has been paid.

19. The learned Magistrate failed to appreciate the affidavit of evidence which clearly shows the existing liabilities and wrongly acquitted the opposite party only on the basis of evidence of PW1/appellant where he denied having any personal liability with the opposite party. The burden of proof shifts to the opposite party to rebut the presumption and raise a probable defence.

20. In cross examination not a single question was put to the opposite party to rebut the liability. In examination under Section 313 Cr.P.C the opposite party stated that "I have not issued any cheque. I do not know how they have got the cheque. May be with fraudulence and I don't have any liabilities to them." The opposite party did not challenge the issuance of such fraudulent cheque. No defence has been taken nor any documents placed challenging the impugned cheque.

21. It is submitted by the learned Senior Counsel on behalf of the respondent placing reliance on the judgment of the Hon'ble Supreme Court in **Basalingappa vs. Mudibasappa** reported in **(2019) 5 SCC 418** that to rebut the presumption under Section 139 of the NI Act, it is open for the accused to rely evidence laid down by the appellant/complainant

or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Interference of preponderance of probability can be drawn not only from the materials on record by the parties but also by reference to the circumstances upon which the parties rely.

22. In course of examination the complainant as PW1 stated that the respondent was not personally liable to the complainant/firm. Probably the complainant wanted to mean that the partnership concern of the respondent, namely, Everest Business House was liable for payment of the existing debt or liability to the complainant/firm. The learned Senior Counsel on behalf of the respondent heavily banks upon the aforesaid reply of the complainant in course of his cross examination. However, the materials on record in the form of documentary evidence prove that the complainant firm provided a sum of Rs.75 lacks to the respondent as loan. The respondent refunded a sum of Rs.18 lacks out of the said Rs.75 lacks. Thus, considering the documentary evidence filed by the complainant this Court has no hesitation to hold that the respondent had existing debt or liability and she failed to rebut the presumption available to the complainant under Section 139 of the NI Act.

23. It is contended by the learned Advocate for the respondent that the accused was not properly examined under Section 313 of the Cr.P.C and she was thereby prejudiced. I do not find any substance in such argument advanced by the learned Counsel on behalf of the respondent. The purpose of examination of the accused under Section 313 of the

Cr.P.C is to ascertain the defence plea on the incriminating circumstances appearing against him/her in course of evidence on behalf of the prosecution/complainant. When it is found that the accused understood the questions properly and gave proper reply which was recorded by the trial court, trial of the case cannot be stated to be vitiated for improper examination of the accused under Section 313 of the Cr.P.C.

24. It appears from the registered envelope containing demand notice that the demand notice was sent in three addresses, viz, in the residential address of the accused at Sunflower Garden, Flat No.9F, Topsia and in the address of her business place at 64 Nehru Colony, Netaji Subhas Chandra Bose Road, P.S Regent Park, Kol-40 and also at 46, Nehru Colony, Netaji Subhas Chandra Bose Road, Kol-40.

25. All the three notices returned with postal endorsement "Not known". The learned Advocate for the appellant draws my attention to the petition of complaint and copy of the summons lying in the lower court record to show that the accused received the summons in the same address where demand notice was sent. Thus, there cannot be any doubt that the demand notice was sent to the accused in Kolkata address.

26. The learned Advocate for the appellant argued that in a case under Section 138 of the NI Act the mandatory requirement of issue of notice to the drawer in terms with Section 138 proviso (b) is complete when the notice is sent in the said manner. The drawer of the cheque can rebut the presumption of service of notice by showing that she had no knowledge that the notice was brought to the address or address mentioned was

incorrect or letter was never tendered or the report of the postman was incorrect.

27. It is argued on behalf of the appellants that when the payee dispatches a notice under registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the General Causes Act would be attracted and the requirement of clause (b) of the proviso to Section 138 of the N.I Act would stand complied with and cause of action to file the complaint would arise on the expiry of the period prescribed in clause (c) of the said proviso for payment by the drawer of the cheque.

28. It is contended under Section 114 of the Evidence Act the Court may presume the existence of certain facts which it thinks rightly to have happened. It is submitted by the learned Advocate for the appellant that in the present case notice demanding payment of the cheque amount was issued to the opposite party under registered post with AD but it was returned stating "Not Known". Before the return of the letters, a letter was addressed to the Post Master General, Council House Street on 21st January, 2016 requesting to issue certificate of delivery of said notice. Appellant averred that since the notice was properly stamped and correctly addressed so, it may be presumed under General Clauses Act that the said notice was served upon the accused on or about 11th January, 2016.

To buttress his argument Ld. Advocate for the appellant relied upon the decision in the case of **K. Bhaskaran vs Sankaran Vaidhyan Balan & Anr.** reported in **(1999) 7 SCC 510.**, wherein it has been held in Para 19:

“19. In Black’s Law Dictionary “giving of notice” is distinguished from “receiving of the notice”: “A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it.” A person “receives” a notice when it is duly delivered to him or at the place of his business.

20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice at the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.”

29. It has been pointed out by the Ld. Advocate for the opposite party that the address mentioned in appeal is different from the envelope. All the three envelopes returned as “Not Known”. In **State of Madhya Pradesh vs. Hiralal & Ors.** reported in **(1996) JT (SC) 669** wherein it has been held that even in respect of endorsements “not available in the house”, “house locked” and “shop closed”, the notice must be deemed to have been served, it is held by Karnataka High Court in **Fakirappa vs.**

Shiddalingappa reported in **2002 CrLJ 1928** that the endorsement “left, not known” stands on the same footing as above and the notice must be deemed to have been served. “Deemed service” means that it is presumed to be served. The onus is upon the addressee to satisfy the court that having regards to the facts and circumstances of the case there was no possibility of service of the notice. He cannot merely take the advantage of the endorsement of the postal peon.

30. The proviso to Section 138 of the Act affords clear indication that ‘giving notice’ in the context is not the same as receipt of notice. Giving is the process of which receipt is the accomplishment. The payee has to perform the former process by sending the notice to the drawer at his correct address.

31. In respect of Criminal Appeal No.715 of 2018 arising out of CS-0082901 of 2016 it appears that demand notice was sent to the accused on 4th April, 2016. The copy of the said notice is marked Exhibit-24 during trial of the case. On 2nd May, 2016 the learned Advocate for the complainant wrote a letter to the Director, GPO Kolkata requesting him to inform as to whether the demand notice was actually delivered to the accused or not. The Director, GPO Kolkata by a letter dated 4th May, 2016 informed that the notice sent under registered post vide transaction No.EW209803328IN on 5th April, 2016 was duly delivered on 6th April, 2016. The said report is marked as Exhibit-26 and 27 series during trial of the case.

32. In view of postal report, this Court has no hesitation to hold that in connection with complaint case No.CS0082901/16, demand notice was duly served upon the accused.

33. For the reasons stated above this Court is of the view that the impugned judgment and order of acquittal passed in favour of the accused/respondent is liable to be set aside.

34. Accordingly both the appeals are allowed on contest.

35. The judgment and order of acquittal passed in Complaint Case No. CS-0058948/2016 and CS-0082901/2016 are set aside.

36. Both the cases are remanded to the court below for recording conviction and sentence against the respondent.

37. Accused/respondent is directed to appear before the trial court within two weeks from the date of receipt of this judgment by the trial court.

38. Let a plain copy of this order duly certified by the ACO of this Court be handed over the accused free of cost.

(Bibek Chaudhuri, J.)