

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

210

CRR-849-2021 (O&M)
Reserved on: 17.02.2022
Pronounced on: 02.03.2022

PREM SINGH ROHILA

...Petitioner

Versus

STATE OF HARYANA AND ANOTHER

...Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present : Mr. Sunny Kadiyan, Advocate
for the petitioner.

Mr. Kanwar Sanjiv Kumar, AAG Haryana.

Mr. Sukhdeep Singh, Advocate
for respondent No.2/complainant.

VINOD S. BHARDWAJ. J.

This case has been taken up through video conferencing via Webex facility in the light of pandemic Covid-19 situation and as per instructions.

2. The instant revision petition raises a challenge to the impugned judgment dated 04.03.2021 passed in CRA No.63 of 2020 by Additional Sessions Judge, Panipat as well as the judgment of conviction dated 17.12.2019 and order of sentence dated 19.12.2019 passed in criminal complaint case bearing CIS No. NACT-2255 of 2018 under Section 138 of the Negotiable Instruments Act by the Court of Judicial Magistrate 1st Class, Panipat.

3. By virtue of the impugned judgment, the petitioner had been convicted for offences under Section 138 of the Negotiable Instruments Act, 1881 and had been sentenced to undergo imprisonment for a period of six months.

Besides, the convict/petitioner had also been ordered to pay an amount of Rs.2,02,500/- as compensation to the complainant under Section 357(3) CrPC, for his suffering due to dis-honour of the cheque for an amount of Rs.1,35,000/- as well as towards loss of interest on the amount and expenses incurred in pursuing the proceedings.

4. Brief conspectus of facts culled out from the judgment of conviction passed by the Judicial Magistrate 1st Class, Panipat, shows that the petitioner (accused) is alleged to have issued a cheque bearing No.584258 dated 25.03.2018 for a sum of Rs.1,35,000/- drawn on Canara Bank, Branch Office Assandh Road, Panipat towards discharge of his liabilities. The aforesaid cheque (Ex.C-1) was presented by the complainant through his banker, however, the same was dis-honoured by the banker of the accused upon its presentation with remarks 'funds insufficient' vide return memos dated 29.03.2018, 11.04.2018 and 04.05.2018 (Exs. C-2 to C-4). Aggrieved thereof, the respondent-complainant issued a mandatory legal notice in terms of Section 138 of the Negotiable Instruments Act dated 10.05.2018 (Ex. C-5) and the postal receipt thereof was exhibited as Ex.C-6. The accused-petitioner is alleged to have not responded to the said legal notice and also did not tender the claimed amount resulting in institution of the complaint in question. Notice of accusation was served upon the petitioner on 12.04.2019, to which he pleaded not guilty and claimed trial. After considering the submissions of the respective parties, trial Court recorded a finding of conviction against the petitioner. The appeal filed by the petitioner against the judgment of conviction and order of sentence was dismissed by the Additional Sessions Judge, Panipat. Hence, the revision petition.

5. Learned counsel for the petitioner has argued that the Courts below

have failed to appreciate the evidence and have consequently convicted the petitioner, even though the petitioner had dispelled the statutory presumption under Section 139 of the Negotiable Instruments Act, 1881. Learned counsel contended that the complainant has miserably failed to establish that the cheque in question had ever been handed over by the petitioner to the complainant in discharge of any legally enforceable debt and by ignoring the total absence of evidence in this regard, the Courts below have relied solely on the presumption against the petitioner notwithstanding that the presumption was rebuttable and that upon existence of reasonable suspicion, the burden would shift and it would fall upon the complainant to prove that the issuance of instrument was in discharge of a legally enforceable debt. In support of his aforesaid argument, learned counsel has placed reliance upon the complaint instituted by the respondent-complainant wherein, the following averment is made in para No.2.

'2. That the accused has demanded a sum of Rs.1,35,000/- from the complainant as borrowed amount for six months in the month of October 2017 for personal use. On this demand the complainant has paid an amount of Rs.1,35,000/- to the accused in the month of October 2017 without any written endorsement being the sweet relation in between each other.'

6. It is submitted that the aforesaid averment was also incorporated in the affidavit tendered by the complainant before the Court. Reference was also made to the excerpts of the cross-examination of the complainant, which is as under:-

'I am seventh class passed. I work in factory. There is a factory named Shivangi in Rajasthan. My income is Rs.15,000/- per month. I do not have any proof of income. Get cash. I have an account with Union Bank of India, in which I deposit money. I have not brought my account details today.'

XXXXXXXXXXXXXXXXXXXX. I have never done business with Prem Kumar. I do not know what work Prem Kumar does. How much is that Prem Kumar income. I do not know how educated Prem Kumar. XXXXXXXXXXXXXXXXXXXXXXX. I do not have any proof regarding money transaction. In which there is no receipt or other written proof. Said himself there was a transaction with him before. I have not given any record on file regarding money. In which RTGS, D.D., bank cheque, account statement. So that it can be proved that I had given money to Prem Kumar. I have given any affidavit in this case or not. I do not care the lawyer would know I have not put any proof of my income on file. I have a witness to the money transaction, but till date I have neither told in the file or told the lawyer. XXXXXXXXXXXXXXXXXXXXXXX. I fill ITR. I have neither given the ITR of that year in the case in the Court nor about its today. I did not steal this cheque from Prem Kumar shop and after stealing the cheque the wrong amount is fixed. XXXXXXXXXXXXXXXXXXXXXXX.'

(Emphasis supplied)

7. By placing reliance on the same, learned counsel for the petitioner has argued that the complainant has failed to give any detail about his proof of income or the time when the amount of Rs.1,35,000/- was allegedly lent to the petitioner. It is further not established as to whether the complainant had sufficient means to advance such huge amount considering that his monthly income was Rs.15,000/- per month only and that he was employed as a labourer/worker in a factory in Rajasthan and he used to live in a rented accommodation. It is also argued that as per the cross-examination, the complainant had never done business with the petitioner and as such, there was no occasion or reason for the complainant to advance any amount to the petitioner without executing any document in support of such transaction. It is also contended that the complainant admits that he does

not have any proof regarding the money transaction amongst them, hence, there can be no presumption of fact that any amount had been advanced by the complainant to the petitioner. By making a reference to the cross-examination, where the complainant states that he has a witness to the money transaction but he chose not to mention the details of the witness either in the complaint or in the evidence, it is submitted that the complainant has withheld the best evidence. There is no reason why the details and description of the witness to the transaction in question should be withheld and why the said witness be not examined in Court to prove the transaction. It was argued that an adverse inference thus needs to be drawn against the complainant and the statutory presumption under Section 139 of the Negotiable Instruments Act, 1881 cannot subsist against the petitioner in the said backdrop. In the absence of any fiduciary relationship and lack of financial ability of the complainant, there was no occasion to advance such huge amount without proper documents.

8. It has also been argued by the learned counsel for the petitioner that the trial Court has passed its order in a mechanical manner without noticing the evidence led by the petitioner. It is observed by the JMIC, Panipat, in Para 8 of its judgment that the accused led no evidence in defence, whereas, the petitioner had actually stepped as a witness and his affidavit in this regard is exhibit DW1/A. In the said affidavit, it was specifically sworn by the petitioner that his signed cheque had been lost from the shop and the same has been stolen by the complainant. It was presented as a misuse of the instrument by the complainant. Learned counsel submitted that even though the petitioner was also subjected to cross-examination by the complainant, however, no suggestion was given about the date and time when the amount was advanced to the petitioner or the date, time or place when

the cheque in lieu of allegedly borrowed amount was issued by the petitioner. It is, thus, submitted that the complainant has failed to establish by any primary evidence about having advanced the amount and has also failed to give details as to when the cheque in question was issued in favour of the complainant, in discharge of the liability, if any. It is further argued that by failing to make a reference to the testimony of the petitioner as a witness, trial Court has not considered the case in its entirety. The judgment of conviction has thus been passed in a mechanical manner without application of mind and by placing reliance on the self serving sole testimony of the complainant. The aforesaid aspects have also not been taken into consideration by the lower Appellate Court and the said Court has upheld the judgment of conviction by observing that the complainant was earning handsomely (even though the complainant stated of receiving a monthly salary of Rs.15,000/-) and has in the said process completely ignored that proof of existence of the transaction amongst the parties is a condition precedent before a presumption could be drawn against him. The aforesaid observation was also not corroborated by any evidence and was no means with the lower Appellate Court to ascertain the fiscal position of the complainant. The opinion of the lower Appellate Court was thus not borne out from the evidence available on record.

9. On the other hand, learned counsel appearing on behalf of the respondent No.2-complainant has argued that the petitioner has not disputed his signatures on the cheque in question and has also failed to adduce any evidence to substantiate that the cheque in question was ever stolen. Reference was made to the excerpt of the cross-examination of the accused-petitioner to submit that the petitioner has not been able to lead any evidence to show that he had, at any point

in time, submitted any complaint about his missing cheque to the Police and that he chose not to respond even to the legal notice sent by the complainant before institution of the proceedings under Section 138 of the Negotiable Instruments Act. There is a presumption under Section 139 of the Negotiable Instruments Act that an instrument is presumed to have been issued in discharge of a legally enforceable debt and that in the absence of denial of the signatures on the cheque or any evidence by the petitioner to show that the cheque in question had actually been stolen, it must be presumed that the petitioner had issued the cheque to the complainant in discharge of his liability. There is no reason or occasion for any prudent person not to agitate and pursue his right in case any of his signed instrument is stolen and is misused. It was submitted that the argument raised by the petitioner is an afterthought as the amount had been advanced in good faith considering that the father of the complainant and the petitioner used to carry on their business adjacent to each other. The petitioner is stated to have a shop dealing in cement/building material and the father of the complainant used to have a *rehri* as a vegetable vendor. It is further argued by learned counsel for the complainant that the petitioner has not been able to offer any explanation as to why he left a signed blank cheque in his shop and that he having not denied his signatures on the instrument, there is a presumption that the issuance of cheque was valid and the complainant is holder of cheque in due course. It is further contended that even though the complainant was working in a factory in Rajasthan, however, he is a permanent resident of Panipat and the cheque in question has not been dis-honoured on account of a mismatch of signatures, but the same is on account of 'funds insufficient'. There is no allegation of forgery of signatures.

10. I have heard the rivals submissions advanced by the parties and have gone through the record with their assistance.

11. Before proceeding further in the matter, Section 138 of the Negotiable Instruments Act, 1881, under which the present proceedings have fallen, needs to be extracted and the same 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 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,²⁰[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.]'

12. Section 139 of the Negotiable Instruments Act raises a statutory presumption in favour of the holder of cheque. The relevant provision is extracted as under:-

'[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.]'

13. It is a settled proposition of law that presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from a presumption of fact, such a presumption is a rebuttable presumption and the drawer of the cheque may dispel the same. The aforesaid position in law stands settled in the judgment of the Hon'ble Supreme Court in the matter of **Hiten P. Dalal Vs. Bratindranath Banerjee (2001) 6 SCC 16.** While dealing with the aspect of presumption in terms of Section 139 of the Negotiable Instruments Act, the Hon'ble Supreme Court observed as under:-

'21.The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "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".

The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

*22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A. Vaidyanatha Iyer AIR 1958 SC 61, it is **obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established.** "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact **unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.***

*23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists" . **Therefore, 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'.

24. Judicial statements have differed as to the quantum of rebutting evidence required. In *Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay AIR 1961 SC 1316*, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in *Dhanvantrai Balwantrai Desai vs State of Maharashtra AIR 1964 SC 575*, where this Court reiterated the principle enunciated in *State of Madras vs Vaidyanath Iyer (Supra)* and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is **where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence**

to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

[See also V.D. Jhingan vs. State of Uttar Pradesh AIR 1966 SC 1762; Sailendranath Bose vs. The State of Bihar AIR 1968 SC 1292 and Ram Krishna Bedu Rane vs. State of Maharashtra 1973 (1) SCC 366.]

(Emphasis supplied)

14. It was, thus, held that the obligation on the prosecution may be discharged with the help of presumption of law or fact, unless, the accused adduces evidence showing reasonable possibility of the non-existence of the presumed fact. Thus, to say that if the facts required to form the basis of a presumption of law exist, there is no discretion left with the Court but to draw the statutory conclusion, but the same does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. The rebuttal does not have to be conclusively established, but such evidence must be adduced 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'.

15. Reference is also necessary to be made to the judgment of the Hon'ble Supreme Court in the matter of **Kumar Exports Vs. Sharma Carpets (2009) 2 SCC 513**. The relevant extract of the same is as under:-

'13. In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain presumptions to be raised. This Section lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument passes from hand to hand on endorsement and it would make trading very

difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade. Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of indorsements, (vi) as to appropriate stamp and (vii) as to holder being a holder in due course.

14. Section 139 of the Act provides that 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.

15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Indian Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable) and (3) "conclusive presumptions" (irrebuttable). The term 'presumption' is used to designate an inference, affirmative or disaffirmative of the existence a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

16. Section 4 of the Evidence Act inter-alia defines the words 'may presume' and 'shall presume' as follows: -

"(a) 'may presume' - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.

(b) 'shall presume' - Whenever it is directed by this Act

that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

In the former case the Court has an option to raise the presumption or not, but in the latter case, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved.

17. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability.

18. Applying the definition of the word 'proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with

definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

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, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.'

(Emphasis supplied)

16. The law is thus well settled that in order to rebut the statutory presumption, 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. 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, bare denial of the passing of the consideration and existence of debt would not serve the purpose of the accused. To disprove the presumption, an 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 that 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.

17. In the matter of **Rangappa Vs. Sri Mohan (2010) 11 SCC 441**, the Hon'ble Supreme Court observed on the matter of presumption cast under Section 139 of the Negotiable Instruments Act and held as under:-

'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 (supra) 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 accused/defendant cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.'

18. In the matter of **John K. Abraham Vs. Simon C. Abraham And Another (2014) 2 SCC 236**, the Hon'ble Supreme Court observed that in order to draw presumption under Section 118 read with Section 139 of the Negotiable Instruments Act, burden lies on the complainant to show (i) that he had the requisite funds for advancing the sum of money/loan in question to the accused (ii) that the issuance of cheque by accused in support of repayment of money advanced was true and (iii) that the accused was bound to make payment as had been agreed while issuing cheque in favour of the complainant. Taking note of the fact that the complainant was not aware of the date when the substantial amount was advanced by him to the accused and his failure to produce relevant documents

in support of the alleged source for advancing money to an accused, the judgment convicting the accused was set aside by holding the same to be perverse. The relevant facts noticed from the aforesaid judgment are extracted as under:-

'6. When we examine the case of the respondent-complainant as projected before the learned Chief Judicial Magistrate and the material evidence placed before the trial Court, we find that the trial Court had noted certain vital defects in the case of the respondent-complainant. Such defects noted by the learned Chief Judicial Magistrate were as under:

*a) **Though the respondent as PW-1 deposed that the accused received the money at his house also stated that he did not remember the date when the said sum of Rs.1,50,000/- was paid to him.***

*b) As regards the source for advancing the sum of Rs.1,50,000/-, the respondent claimed that the same was from and out of the sale consideration of his share in the family property, apart from a sum of Rs.50,000/-, which he availed by way of loan from the co-operative society of the college where he was employed. **Though the respondent stated before the Court below that he would be in a position to produce the documents in support of the said stand, it was noted that no documents were placed before the Court below.***

c) In the course of cross-examination, the respondent stated that the cheque was signed on the date when the payment was made, nevertheless he stated that he was not aware of the date when he paid the sum of Rs.1,50,000/-.

d) According to the respondent, the cheque was in the handwriting of the accused himself and the very next moment he made a contradictory statement that the cheque was not in the handwriting of the appellant and that he (complainant) wrote the same.

e) The respondent also stated that the amount in words was written by him.

f) The trial Court has also noted that it was not the case of the respondent that the writing in the cheque and filling up of the figures were with the consent of the accused appellant.

9. It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced 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.

10. Keeping the said statutory requirements in mind, when we examine the facts as admitted by the respondent-complainant, as rightly concluded by the learned trial Judge, the respondent was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the appellant, that he was not sure as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as PW.1 by stating once in the course of the cross- examination that the cheque was in the handwriting of the accused and the very next moment taking a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself, by further reiterating that the amount in words was written by him.

11. We find that the various defects in the evidence of respondent, as noted by the trial Court, which we have set out

in paragraph 7 of the judgment, were simply brushed aside by the High Court without assigning any valid reason. Such a serious lacuna in the evidence of the complainant, which strikes at the root of a complaint under Section 138, having been noted by the learned trial Judge, which factor was failed to be examined by the High Court while reversing the judgment of the trial Court, in our considered opinion would vitiate the ultimate conclusion reached by it. In effect, the conclusion of the learned Judge of the High Court would amount to a perverse one and, therefore, the said judgment of the High Court cannot be sustained.'

(Emphasis supplied)

19. In the matter of **Basalingappa Vs. Mudibasappa (2019) 5 SCC 418**, while dealing with the standard of proof and the presumption drawn under the Negotiable Instruments Act, the Hon'ble Supreme Court has observed as under:-

'14. Justice S.B. Sinha in M.S. Narayana Menon Alias Mani Vs. State of Kerala and Another, (2006) 6 SCC 39 had considered Sections 118(a), 138 and 139 of the Act, 1881. It was held that presumptions both under Sections 118(a) and 139 are rebuttable in nature. Explaining the expressions "may presume" and "shall presume" referring to an earlier judgment, following was held in paragraph No.28:-

"28. What would be the effect of the expressions "may presume", "shall presume" and "conclusive proof" has been considered by this Court in Union of India v. Pramod Gupta, (2005) 12 SCC 1, in the following terms: (SCC pp. 30-31, para 52)

"It is true that the legislature used two different phraseologies 'shall be presumed' and 'may be presumed' in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the

Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words 'shall presume' would be conclusive. The meaning of the expressions 'may presume' and 'shall presume' have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression 'shall presume' cannot be held to be synonymous with 'conclusive proof'."

15. It was noted that the expression "shall presume" cannot be held to be synonymous with conclusive proof. Referring to definition of words "proved" and "disproved" under Section 3 of the Evidence Act, following was laid down in paragraph No.30:

*"30. Applying the said definitions of "proved" or "disproved" to the 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 defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."*

*16. **This Court held that what is needed is to raise a probable defence, for which it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and even the evidence adduced on behalf of the complainant can be relied upon.** Dealing with standard of proof, following was observed in paragraph No.32:-*

"32. The standard of proof evidently is preponderance of

probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.”

17. In *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde*, (2008) 4 SCC 54, this Court held that 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. Following was laid down in Paragraph No.32:-

“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.”

18. This Court again reiterated that 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”. In paragraph No.34, following was laid down:-

“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.”

25. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) Once the execution of cheque is admitted Section 139 of the

Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. 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 they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

26. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused. In cross-examination of the PW1, when the specific question was put that cheque was issued in relation to loan of Rs.25,000/- taken by the accused, the PW1 said that he does not remember. PW1 in his evidence admitted that he retired in 1997 on which date he received monetary benefit of Rs. 8 lakhs, which was encashed by the complainant. It was also brought in the evidence that in the year 2010, the complainant entered into a sale agreement for which he paid an amount of Rs.4,50,000/- to Balana Gouda towards sale consideration. Payment of Rs.4,50,000/- being admitted in the year 2010 and further payment of loan of Rs.50,000/- with regard to which complaint No.119 of 2012

was filed by the complainant, copy of which complaint was also filed as Ex.D2, there was burden on the complainant to prove his financial capacity. In the year 2010-2011, as per own case of the complainant, he made payment of Rs.18 lakhs. During his cross-examination, when financial capacity to pay Rs.6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts.'

(Emphasis supplied)

20. A perusal of the same shows that the failure of the complainant to display his financial capacity to advance the amount alleged to have been lent would shift the burden on the complainant to prove his financial capacity to lend the money as well as the other circumstances to establish existence of consideration for issuance of cheque. After noticing that there was no evidence led before the Court to indicate the financial capacity of the complainant to lend the money in question, the Hon'ble Supreme Court held that the judgment of conviction suffered perversity and was thus liable to be set aside. It was observed that the accused had raised a probable defence and that the complainant failed to prove his financial capacity on the basis of evidence led by him and thus ordered acquittal of the accused.

21. Facts of the instant case and the evidence brought on record and referred to by the parties are thus examined in the light of the aforesaid judicial pronouncements of the Hon'ble Supreme Court. The following picture emerges from a consideration thereof:

- (i) The complainant has alleged in the complaint that he had advanced a sum of Rs.1.35 lakhs to the accused in the month of October 2017

without any written endorsement and out of relationship amongst the parties, however, during the course of cross-examination the complainant has stated that he had never done any business with the petitioner and has no necessary information as would normally be known to any person with whom there is personal relationship.

(ii) The complainant has further failed to adduce any proof of income.

The complainant did not even bring-forth his account statements or the banking details.

(iii) The complainant has failed to establish availability of such a huge amount considering that the complainant used to earn a meagre salary of Rs.15,000/- per month while working as a labourer in a factory and was staying in a rented accommodation in Rajasthan.

(iv) The complainant acknowledges in the cross-examination that he did not have any proof regarding money transaction or any written receipt/acknowledgment.

(v) The complainant has stated in the cross-examination that he had a witness to the money transaction, however, neither the said aspect has been mentioned in the complaint nor any such witness has been adduced by the complainant in evidence. Hence, the best evidence has been withheld.

(vi) The complainant has although stated in his evidence that he had transacted with the accused on earlier occasions as well, however, no evidence in this regard has been adduced. The said statement is also contradictory since complainant himself stated that he had no transactions or business with petitioner.

- (vii) There is no plausible reason why the complainant would lend money to a person with whom he had no relationship and that too without execution of any documents as would be expected of a person of ordinary prudence. No valid explanation has been placed about failure to take minimum prudent steps prior to lending the amount.
- (viii) The complainant has failed to give any reason or the background as to why such huge amount had been lent to the petitioner and the circumstances as well as the terms on which the same had been lent.
- (ix) There is no evidence other than the self serving testimony of the complainant to prove existence of a liability before issuance of cheque.
- (x) Merely by being in possession of cheque, the complainant does not stand absolved of his obligation to prove existence of liability and a legally enforceable debt prior to issuance of the cheque.
- (xi) The surrounding circumstances and conduct in the form of withholding of best evidence leave scope for improbabilities and doubts about the prosecution version. An inference thus has to be drawn against the complainant.
- (xii) The accused-Petitioner further suggested and had taken a specific plea that the cheque in question had been stolen from his shop.
- (xiii) The petitioner also denied knowing the complainant-Guddu.
- (xiv) The petitioner denied the suggestion about having been lent any money by the complainant.
- (xv) The trial Court has stated in its judgment that no witness has appeared in defence, whereas, the petitioner had stepped as witness;

such fact is corroborated from the judgment of the Additional Sessions Judge as well. The affidavit of the petitioner is exhibit DW1/A and he was subjected to cross-examination as well.

22. The same would now lead to the consideration as to whether failure on the part of an accused to respond to the legal notice can be assumed as acceptance of the liability and as to whether despite the complainant having been questioned with respect of his financial capabilities and capacity to make such advance there should be a presumption as regards his capacity. While dealing with the issue on financial capacity the lower Appellate Court has observed as under:-

'19. As regards the financial capacity of the complainant to advance the loan of Rs.1,35,000/-, no doubt there is no receipt executed at the time of advancement of loan nor it was shown in his ITR by the complainant but it has come in evidence that the complainant is working in a factory in Rajasthan and is earning handsomely. The complainant had also stated that he used to reside on rent in the locality where the accused was residing and he had friendly relations with the accused. This fact was nowhere denied by the accused in cross-examination of the complainant.'

23. The finding recorded by the trial Court is also extracted as under:-

23. In statement under section 313 Cr.P.C. of accused Prem Singh Rohilla, accused has taken defence that he has no dealings with complainant Guddu Kumar and cheque was stolen by some person which was later on misused by complainant. The entire record shows that accused has failed to prove that cheque was firstly stolen by complainant and then later on was misused by him. He has failed to explain that why he did not file any reply to the legal notice despite service of the same. Accused has also failed to explain that why he did not file any application before suitable authorities when cheque

was stolen in order to safeguard his Interest. He has also not produced any expert in order to show that cheque has not been filled up by him or signed by him.

24. In fact, the accused has admitted in his cross-examination that he had dealings with father of complainant in past. There has been no overwriting or cutting on original cheque which raises any doubt or suspicion as to the authenticity or genuineness of the document. The defence has also failed to produce any expert in order to establish that the signatures does not belong to accused on original cheque i.e. Ex.C1 on record.'

24. The foundation of such presumption of Courts below is not on the basis of any affirmative evidence led by the complainant, rather, a negative burden has been cast upon the accused to establish that he had not availed of the money alleged to have been advanced to him. The petitioner having denied issuance of the cheque and having denied receipt of any money from the complainant or having any transaction with him coupled with the circumstances noticed in Para 21 of the judgment, the presumption of law under Section 139 of the Negotiable Instruments Act would not continue to exist against the accused-petitioner and the burden would shift upon the complainant to establish that the transaction in question had duly taken place and that the cheque had been issued to him in discharge of a legally enforceable debt.

25. A perusal of the noticeable discrepancies and lapses shows that the petitioner has been able to rebut his burden and the consequent operation of presumption under Section 139 of the Negotiable Instruments Act against him. The burden thus shifted on the complainant to lead affirmative evidence to show a pre-existing liability and the same to be legally enforceable at the time of issuance of cheque. The failure to display prudence of an ordinary person and to establish

his capacity to advance the sum to the petitioner give rise to a suspicion against presence of an enforceable debt against the petitioner and thus tilting the balance in favour of the accused. The burden lies on the complainant to prove his case against the accused, in whose favour, there is a presumption of innocence.

26. In light of the position of law referred to above and as also the facts noticed above, I find that the judgment passed by the Courts below are conjectural and are not based upon objective assessment of the material adduced on record. The Courts below have failed to take account of the shift of onus on the complainant to establish having advanced the money and that the cheque in question had been duly issued to him in discharge of the liability and to have proceeded solely on the basis of presumption under Section 139 of the Negotiable Instruments Act, 1881 ignoring all other circumstances.

27. Accordingly, the judgment dated 04.03.2021 passed by the Additional Sessions Judge, Panipat, as well as the judgment of conviction dated 17.12.2019 and order of sentence dated 19.12.2019 passed by Judicial Magistrate 1st Class, Panipat, are set aside and the petitioner is acquitted.

Petition is allowed.

(VINOD S. BHARDWAJ)

JUDGE

02/03/2022

S.Sharma(syr)

<i>Whether speaking/reasoned</i>	:	<i>Yes/No</i>
<i>Whether reportable</i>	:	<i>Yes/No</i>