IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 371 of 2019

Pratim Das

Vs

Emarat Sebji & Anr.

For the Petitioner	:	Ms. Susmita Ghorai.
For the Opposite Parties	:	None.
Heard on	:	04.01.2023
Judgment on	:	25.01.2023

Shampa Dutt (Paul), J.:

The revisional application has been preferred praying for setting aside/quashing of the judgment and order dated 05.10.2018 passed by the Learned Additional District Judge, 4th Court, Malda, Acquitting the appellant Emarat Sabji who was convicted and sentenced under Section 138 N.I. Act to suffer simple imprisonment for two days and also directed to pay compensation of Rs. 5,50,000/- to complainant namely Pratim Das in default to suffer simple imprisonment for six months by the Judgment and Order dated 12.04.2018 passed by the Learned Judicial Magistrate, 1st Court, Malda in Case No. 392C/2012.

The said Emarat Sebji was the accused before the Learned Trial Court in complaint Case No. C 392/12/T.R. No. 1100/12 and he was found guilty U/S 255(2) Cr.P.C. and was convicted for the offence punishable U/s 138 of the N.I. Act and was sentenced to suffer simple imprisonment for two days U/s 138 of N.I. Act and was directed to pay compensation of Rs. 5,50,000/- to the complainant Pratim Das and in default to suffer simple imprisonment for six month.

The convict/Emarat Sebji/opposite party challenged the impugned judgment of Learned Trial Court and filed an appeal before the Learned District and Sessions Judge, Malda and the Ld. District and Sessions Judge transferred the Appeal to the court of the Learned

Additional District Judge, 4th Court, Malda and on 05.10.2018 the Learned Additional Judge, 4th Court, Malda after hearing all the parties passed the judgment and order under revision acquitting the appellant Emarat Sebji from all charges and set aside the judgment/order of conviction dated 12.04.2018 passed by the Learned Judicial Magistrate, 1st Court, Malda in Case No. 392C/2012.

The accused/appellant/opposite party no. 1 herein only denied the fact of issuing any Cheque in favour of the complainant/petitioner and alleged that the complainant stole the Cheque from his bag. But it appears from the written reply of the accused/appellant dated 13.03.2012 (Ext.4) that the accused/appellant only denied that fact of receiving the amount of Rs. 5,00,000/- from the complainant for supply of Onion and the learned Appellate Court believed the appellant and acquitted him.

Hence the revision.

Ms. Sushmita Ghorai, Learned counsel for the petitioner/complainant has submitted that opposite party did not inform the police or the Bank regarding the loss of Cheque.

Even in his reply to the notice under Section 138 of N.I. Act he did not utter a single word regarding the loss of Cheque and in the last moment to save himself he made up a story before the Learned Trial

Court that the Cheque was stolen by the Complainant/petitioner from his bag but the Learned Trial Court did not believe the story.

The Learned Appellate Court unnecessarily enquired from the complainant as to whether he has any license or not, which is totally irrelevant in this case.

The Learned Appellate Court did not consider that a Cheque of Rs. 5 lacs being No. 559228 in the name of complainant against his bank account No. 06882191-006450 dated 27.01.2012 issued on Oriental Bank of Commerce Station Road Branch, Rathbari by the opposite party and which the complainant deposited on 10.02.2012 in his Bank i.e. Indian Bank for encashment, was returned on 10.02.2012 with the reasons “insufficient funds”.

Thereafter the Complainant issued a notice dated 24.02.12 which was replied to by the learned Advocate of the accused on 13.03.2012 thus proving the receipt of notice and thus the learned Appellate Court did not apply its judicial mind and set aside the order of conviction.

It is further submitted by the learned Counsel for the petitioner that from the cross-examination of Opposite Party No. 1, It is found that he alleged that he was having one business transaction with complainant and for that purpose he has submitted the document in the court (But no such document is on record). It is also further stated that the complainant has not given Rs. 5,00,000/- to the accused/opposite party no. 1 after withdrawing from his bank account but has been allegedly given from own his pocket. It is further alleged that the complainant has also not submitted his Income Tax return nor Trade License. It further appears that the complainant admitted that there is only signature of accused/appellant on the Cheques and rest of the Cheque is filled in the handwriting of the complainant. The complainant has also denied that he took away the signed blank Cheque from the house of the accused in the absence of the accused.

It was further submitted before the appellate court that the complainant has not been able to prove his case wherefrom the presumption U/s 139 of N.I. Act can be raised against the accused.

It is also submitted that the Learned Appellate Court did not consider the evidence on record in the proper perspective and erroneously acquitted the opposite party and as such the judgment under revision is liable to be set aside.

In spite of proper service the opposite party no. 1 has not appeared.

Considering the materials on record and the judgment under revision it is seen that the learned sessions judge (Appellate Court) set aside the order of conviction passed by the learned Magistrate **on his interpretation of Section 139 of the Negotiable Instruments Act**.

Heard the learned counsel for the petitioner at length. Perused the materials on record including the judgement under revision and the judgment of the Trial Court. Considered.

Section 138 of Negotiable Instruments Act lays down:-

> *"**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 provision of this Act, be punished with imprisonment for a term which may extend 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."*

On going through the judgements of the learned Magistrate and the learned Session Judge, it is before this court that there is sufficient/clear evidence to show that the cheque was duly issued and after completion of all formalities the proceedings under section 138 N.I. Act was duly initiated.

Section 139 of Negotiable Instruments Act lays down:-

> *"**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.*
>
> ***Nature and Scope.—*** *This Section raises presumption of law that cheque duly drawn was in discharge of debt or liability. However, presumption is rebuttable and onus lies on drawer to rebut it by adducing cogent evidence to the contrary. This presumption is not in conflict with human right of presumption of innocence of accused which prosecution is required to dislodge by proving its case against accused beyond reasonable doubt, Bir Singh vs. Mukesh Kumar, (2019) 18 SCC 106.*

Burden of rebuttal of presumption.— *The presumption mandated by Section 139 does indeed include the existence of a legally enforceable debt or liability. Bare denial of the passing of the consideration and existence of debt, is not enough to rebut the presumption. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. Rather, something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the consideration did not exist, or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. Accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Section 118 and 139 of the NI Act, Uttam Ram v. Devinder Singh Hudan, (2019) 10 SCC 287."*

In Bir Singh vs. Mukesh Kumar (Criminal Appeals Nos. 230-231 of 2019 the Supreme Court on 06.02.2019, held:-

*"**21.** In passing the impugned judgment and order dated 21-11- 2017, the High Court mis-construed Section 139 of Negotiable Instruments Act, which mandates that unless the **contrary is proved**, it is to be presumed 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. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.

22. *In* ***Hiten P. Dalal vs. Bratindranath Banerjee, (2001) 6 SCC 16****, this Court held that both Section 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. Following the judgment of this Court in* ***State of Madras vs. Vaidyanatha Iyer, AIR 1958 SC 61****, this Court held that it was obligatory on the Court to raise this presumption.*

23. *Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution 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 and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non- existence of the presumed fact as held in* ***Hiten P. Dalal*** *(supra).*

24. *Presumption of innocence is undoubtedly a human right as contended on behalf of the respondent-accused, relying on the judgments of this Court in* ***Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Anr, (2005) 5 SCC 294,*** *and* ***Rajesh Ranjan Yada @ Pappu Yadav vs. CBI through its Director , (2007) 1 SCC 70****. However the guilt may be established by recourse to presumptions in law and presumptions in facts, as observed above.*

25. *In* ***Laxmi Dyechem vs. State of Gujarat & Ors., (2012) 13 SCC 375****, this Court reiterated that in view of Section 139, it has to be presumed that a cheque was issued in discharge of a debt or other liability but the presumption could be rebutted by adducing evidence. The burden of proof was however on the person who wanted to rebut the presumption. This Court held "however, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act".*

26*. In* ***Kumar Exports vs. Sharma Carpets, (2009) 2 SCC 513****, this Court reiterated that there is a presumption that every negotiable instrument duly executed, is for discharge of a debt or liability, but the presumption is rebuttable by proving the contrary. In the facts and circumstances of the case it was found that the cheque in question was towards advance for purchase of carpets, which were in fact not sold by the payee of the cheque to the drawer, as proved from the deposition of an official of the Sales Tax Department, who stated that the payee had admitted that he had not sold the carpets.*

27*. In* ***K.N. Beena vs. Muniyappan and Another (2001) 8 SCC 458****, this Court held that in view of the provisions of Section 139 of the Negotiable Instruments Act read with Section 118 thereof, the Court had to presume that the cheque had been issued for discharging a debt or liability. The said presumption was rebuttable and could be rebutted by the accused by proving the contrary. But mere denial or rebuttal by the accused was not enough. The accused had to prove by cogent evidence that there was no debt or liability. This Court clearly held that the High Court had erroneously set aside the conviction, by proceeding on the basis that denials/averments in the reply of the accused were sufficient to shift the burden of proof on the complainant to prove that the cheque had been* *issued for discharge of a debt or a liability. This was an entirely erroneous approach. The accused had to prove in the trial by leading cogent evidence that there was no debt or liability.*

***28**. In **R. Vijayan vs. Baby and Another (2012) 1 SCC 260,** this Court observed that the object of Chapter XVII of the Negotiable Instruments Act is both punitive as also compensatory and restitutive. It provides a single forum and single proceeding for enforcement of criminal liability by reason of dishonour of cheque and for enforcement of the civil liability for realization of the cheque amount, thereby obviating the need for the creditor to move two different fora for relief. This Court expressed its anguish that some Magistrates went by the traditional view, that the criminal proceedings were for imposing punishment and did not exercise discretion to direct payment of compensation, causing considerable difficulty to the complainant, as invariably the limitation for filing civil cases would expire by the time the criminal case was decided.*

***29**. In **R. Vijayan vs. Baby and another** (supra) this Court observed that unless there were special circumstances, in all cases of conviction, the Court should uniformly exercise the power to levy fine up to twice the cheque amount and keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss, direct payment of such amount as compensation. This Court rightly observed that uniformity and consistency in deciding similar cases by different courts not only increases the credibility of the cheque as a Negotiable Instrument but also the credibility of the Courts of Justice.*

***30.** The judgment of this Court in **Raj Kumar Khurana vs. State of (NCT of Delhi) & Anr. (2009) 6 SCC 72,** was rendered in the particular facts of the case where the drawer of the cheque had reported to the police and the* *bank that two unfilled cheques signed by him had been stolen.*

31. *The proposition as re-enunciated in* ***John K John vs. Tom Varghese & Anr.(2007) 12 SCC 714,*** *cited on behalf of the respondent-accused that if two views are possible, this Court, in exercise of its jurisdiction under Article 136 of the Constitution would ordinarily not interfere with a judgment of acquittal, is well settled.*

32. *In the aforesaid case this Court affirmed an acquittal under Section 138 of the Negotiable Instrument Act, in the peculiar facts and circumstances of the case where several civil suits between the parties were pending.*

33*. In* ***Krishna Janardhan Bhat vs. Dattatraya G. Hegde (2008) 4 SCC 54****, cited on behalf of the respondent-accused, this Court reaffirmed that Section 139 of the Act raises a presumption that a cheque duly drawn was towards a debt or liability. However, keeping in view the peculiar facts and circumstances of the case, this Court was of the opinion that the courts below had approached the case from a wholly different angle by wrong application of legal principles.*

34. *It is well settled that a judgment is a precedent for the issue of law which is raised and decided. It is the ratio decidendi of the case which operates as a binding precedent. As observed by this Court in* ***State of Punjab & Ors. vs. Surinder Kumar & Ors. (1992) 1 SCC 489****, what is binding on all courts is what the Supreme Court says under Article 141 of the Constitution, which is declaration of the law and not what it does under Article 142 to do complete justice.*

35. *Furthermore, to quote V. Sudhish Pai from his book "Constitutional Supremacy - A Revisit":-*

> *"Judgments and observations in judgments are not to be read as Euclid's theorems or as provisions of statute. Judicial utterances/pronouncements are in the setting of the facts of a particular*

> *case. To interpret words and provisions of a statute it may become necessary for judges to embark upon lengthy discussions, but such discussion is meant to explain not define, Judges interpret statutes, their words are not to be interpreted as statutes. Thus, precedents are not to be read as statutes."*

36. *The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.*

37. *A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.*

38. *If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.*

39. *It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed*

> *cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.*
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> ***40.*** *Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."*

The supreme court in Criminal Appeal No. of 2022 @ SLP (Crl.) No(S) 5241 of 2016, Jain P. Jose versus Santosh & Anr., on 10th November, 2022 while considering the presumptions under Sections 118 N.I Act and 139 N.I Act, held:-

> *"In the aforesaid factual background, we do not think that the High Court was right in holding that the onus was not on the respondent to show that the debt was neither due nor payable. Sections 118 and 139 of the N.I. Act, read:*
>
> ***118. Presumptions as to negotiable instruments. —*** *Until the contrary is proved, the following presumptions shall be made:-*
>
> *(a) of consideration — that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;*
>
> *(b) as to date —that every negotiableinstrument bearing a date was made or drawn on such date;*

(c) as to time of acceptance —that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer —that every transferof a negotiable instrument was made before its maturity;

(e) as to order of indorsements —that theindorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps —that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course —that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

xx xx xx

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.*

Referring the Sections of the N.I. Act, a three Judges Bench of this Court in ***"T. Vasanthakumar Vs. Vijaykumari" (2015) 8 SCC 378,*** *has held:*

> *"9. Therefore, in the present case since the cheque as well as the signature has been accepted by the accused-respondent, the presumption under Section 139 would operate. Thus the burden was on the*

> *accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not, return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence.*

*This decision, refers to an earlier judgment of this Court in "**Rangappa vs. Sri Mohan" (2010) 11 SCC 441**, which elucidating on the presumption under Section 139 of the N.I. Act, observes that this includes a presumption that there exists a legally enforceable debt or liability. However, the presumption under Section 139 of the N.I. Act is rebuttable and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested.*

*A recent decision of a three Judges Bench of this Court in "**Kalamani Tex and Another vs. P. Balasubramanian" (2021) 5 SCC 283**, examines the scope and ambit of the presumption under Sections 118 and 139 of the N.I. Act, to hold:*

"14. Once the 2nd appellant had admitted his signatures on the cheque and the deed, the trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial Court fell in error when

> *it called upon the respondent complainant to explain the circumstances under which the appellants were liable to pay. Such approach of the trial Court was directly in the teeth of the established legal position as discussed above, and amounts to a patent error of law.*
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> *xx xx xx*
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> *17. Even if we take the arguments raised by theappellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated. It is useful to cite "Bir Singh v. Mukesh Kumar", where this court held that:*
>
> > *"Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."*
>
> *18. Considering the fact that there has been anadmitted business relationship between the parties, we are of the opinion that the defence raised by the appellants does not inspire confidence or meet the standard of 'preponderance of probability'. In the absence of any other relevant material, it appears to us that the High Court did not err in discarding the appellants' defence and upholding the onus imposed upon them in terms of Section 118 and Section 139 of the Negotiable Instruments Act."*

Thus in the **present case** the findings of the session judge "that respondent No.1/complainant completely failed to discharge his initial burden of proof is totally erroneous and bad in law. The Session Judge totally overlooked the fact that **Sec 139 N.I Act clearly includes a**

presumption that there exists a legally enforceable debt or liability. However the presumption is rebuttable by the accused. **There is no such requirement of the complainant to discharge his initial burden of proof as held by the Session Judge**.

The question of "failing to discharge his initial burden of proof" by the complainant as held by the Session Judge is erroneous and bad in law and as such the judgement under revision is thus liable to be set aside.

The judgment dated 05.10.2018 in Criminal Appeal No. 04/2018 passed by the Session Judge is **set aside**. The order/judgment of the learned Magistrate dated 12.04.2018 in Case no. C 392/12 is **modified** to the following extent and **affirmed**.

Sec 138 N.I Act provides for punishment of imprisonment for a term which may be extended to two years **or** with **fine which may extend to twice the amounts of the cheque or with both.**

Accordingly the order of conviction of 2 (two) days imprisonment dated 12.04.2018 is set aside. The order/judgment for payment of compensation of rupees 5,50,000 is here by affirmed. The compensation amount is to be paid **within two months** from the date of this judgment and order, failing which the accused/opposite party no. 1 will undergo the six months imprisonment in default of payment of compensation as sentenced by the learned Magistrate.

The criminal revisional application being **CRR 371 of 2019 is disposed of.**

No order as to costs.

All connected applications stands disposed of.

Interim order if any stands vacated.

Let a copy of this judgment sent to the Court of learned Additional District Judge, 4th Court, Malda (Appellate Court) and learned Judicial Magistrate, 1st Court, Malda (Trial Court) for compliance.

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

(Shampa Dutt (Paul), J.)