

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE**

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 154 of 2017

M/s. Laxminarayan Jewellers

Vs.

Prabir Mondal & Anr.

For the Appellant : Ms. Sayanti Santra.

For the State : Ms. Rita Datta.

**For the opposite party
from legal aid** : Mr. Santanu Talukdar.

Heard on : 25.08.2023

Judgment on : 21.09.2023

Shampa Dutt (Paul), J.:

1. The Appeal (against acquittal):-

The present appeal has been preferred against a judgment and order dated 3rd day of November, 2016, passed by the Learned Court of 19th Metropolitan Magistrate, Calcutta, in connection with Complaint Case No. 440/10 corresponding to T.R. No. 1699/14 under Section 138 of the

Negotiable Instruments Act, 1881, thereby observing that the accused person is found not guilty for offence under Section 138 of the Negotiable Instruments Act, 1881 and accordingly the accused person/opposite party was acquitted from the instant case.

2. Appellant/Complainant's case:-

The appellant/complainant's case is that the appellant has preferred this instant appeal against the judgment and order dated 3rd day of November, 2016, passed by the Learned Court of 19th Metropolitan Magistrate, Calcutta, in connection with Complaint Case No. 440/10 corresponding to T.R. No. 1699/14 under Section 138 of the Negotiable Instruments Act, 1881, thereby observing that the accused person is found not guilty for offence under Section 138 of the Negotiable Instruments Act, 1881 and accordingly the accused person/opposite party was acquitted from the instant case.

The appellant states that the appellant is a partnership firm which deals in gold (business) for manufacturing gold ornaments.

That the opposite party/accused was a karigar/job contractor of the appellant's shop and he was known to the appellant for a few years and he used to manufacture gold ornaments after taking gold from the appellant.

That in course of such business dealings by and between the appellant and the opposite party/accused person for last few years, the appellant acquired confidence towards the opposite party. On the basis of that assurance the appellant placed an order with the opposite party and for that purpose the opposite party took from the appellant gold to the tune of Rs.20 lakhs for manufacturing gold ornaments with the understanding and

assurance that the opposite party would return the gold ornaments as early as possible.

But the opposite party/accused person failed to return the finished manufactured gold ornaments to the appellant.

After repeated demands the opposite party/accused person in discharge of his debt and/or liability issued one A/C Payee Cheque vide no.000004 dated 19.01.2010 for Rs.4,80,000/- (Rupees four lakhs and eighty thousand only) drawn on the Bank of India, Baranagar Branch, Kolkata, duly signed by the opposite party/accused person as part payment in favour of the appellant.

The aforesaid cheque on presentation for encashment within its validity period to the appellant's banker, namely, Indian Overseas Bank, Sonapatti Branch, Kolkata, was returned dishonoured with the remark "Insufficient Funds" dated 10.04.2010 and the said cheque along with cheque return memo of the opposite party's banker dated 16.04.2010 were duly received by the appellant's banker accordingly.

Thereafter the appellant on several occasions demanded return of the aforesaid gold and/or money to that tune which the opposite party took from the appellant but the opposite party failed to return the said gold and/or make any payment.

Finding no other alternative the appellant through its advocate sent a demand notice dated 19.04.2016 by registered post with A/D to the opposite party/accused persons demanding to effect the payment of the dishonoured cheque amount to the appellant within 15 days from the date of receipt of the said demand notice. In spite of receipt of the said notice the opposite

party/accused person failed to make the payment of the aforesaid cheque amount.

Thereafter the appellant filed a complaint before the Learned Chief Metropolitan Magistrate, Calcutta, thereby stating commission of an offence under Section 138 of the Negotiable Instrument Act, 1881, against the opposite party/accused person, vide C/440 of 2010.

Upon receipt of the aforesaid complaint, the instant case being Complaint Case No. 440 of 2010 was started against the opposite party/accused person under Section 138 of the Negotiable Instrument Act, 1881.

After completion of trial the Learned 19th Metropolitan Magistrate, Kolkata on 03.11.2016 was pleased to pass the impugned judgment and order thereby acquitting the opposite party/accused person from the said case.

Order dated 07.02.2017, was passed by this Hon'ble Court granting leave to file the appeal in the instant case. Pursuant to the aforesaid order the appellant has preferred this appeal against the impugned judgment and order before the Hon'ble Court.

It is submitted that the accused person/opposite party as a counter blast to the appellant's case also lodged a false criminal case against the appellant being G.R. Case No. 1291/10 arising out of Baranagar Police Station Case No. 168 dated 29.04.2010 under Sections 342/506/420/406/34 of the Indian Penal Code. In that case after trial the Learned Judicial Magistrate, 3rd Court, Barrackpore, North 24 Parganas was pleased to acquit the appellant and the other persons from that false case.

The opposite party/accused person has also filed a criminal case against the appellant Vide G.R. No. 768/10, which is at present pending before the Learned 13th Metropolitan Magistrate, Calcutta. During investigation of the said case the police personnel has taken all the original bills, vouchers and other documents relating to the transactions and/or agreements made between the appellant and the opposite party and at present those documents are in police custody.

Thus it is prayed that in the aforesaid facts and circumstances, the instant impugned judgment and order of acquittal of the opposite party/accused person being not in accordance with law is liable to be set aside.

It is further submitted that the Learned Magistrate failed to consider that the appellant could not produce the bills and vouchers in support of his transactions with the opposite party since those documents are in police custody in relation to another criminal case between the parties.

The Learned Judge failed to consider the fact that a statutory presumption is available in law and illegally came to a finding of acquittal in favour of the opposite party herein is not in accordance with law.

The impugned judgment and order is otherwise bad in law and is thus liable to be set aside.

The following judgments have been relied upon by the appellant/complainant:-

- (i) **T. Vasantha Kumar vs. Vijaya Kumari** reported in **(2015) 8 SCC 378**.
- (ii) **Rangappa vs. Sri Mohan** reported in **(2010) 11 SCC 441**.

(iii) **Kalamani Tex & Anr. vs. P. Balasubramanian** reported in (2021) 5 SCC 283.

(iv) **Bir Singh vs. Mukesh Kumar** reported in (2019) 4 SCC 197.

3. The Defence/Accused's case:-

As the accused/respondent could not be traced, **Mr. Santanu Talukdar, learned legal aid counsel** was appointed to represent the accused.

Mr. Talukdar submits that the judgment under appeal is in accordance with law and as such requires no interference by this Court.

4. Evidence:-

P.W. 1 is the complainant and has reiterated the complaint case. Exhibit 2 is the copy of cheque. Exhibit 3 is the cheque return memo for dishonour of the cheque on the ground of insufficient funds. Exhibit 4 is the demand notice. Exhibit 5 is the postal receipt.

The business relationship between the parties has been admitted by the lawyer of the accused in Exhibit 7.

5. Analysis of Evidence:-

The relevant part of the findings of the learned Trial Judge is as follows:-

“..... Ld. Lawyer for the defence continue hammered on the point that the complainant does not have any local standing to file the instant case and the complainant failed to prove the liability of the accused.

I have carefully gone through the deposition of the complainant who deposed before the court as P.W. 1. In his cross examination he clearly stated that he cannot produce any document relating to the due amount of the accused. He further deposed that he cannot produce any document regarding the business transaction as the police seized all the documents. But nothing have come up before court regarding seizure made by the police. The complainant further stated

*that the transactions were made by challan but he failed to produce such challan also. **The very important ingredients in a case U/s 138 of NI Act is that the liability of accused must be proved.** The complainant failed to produce any document in regard to the business transaction.*

In the instant case the complainant was also not aware of the date when the payment was made and how the payment was made and from where the payment was made.

It appears that there is a serious lacuna in the evidence of the complainant which strike at the root of a complaint U/s 138 of Negotiable Instruments Act and the same would vitiate the ultimate conclusion to be reached by this court. It is also a fact that the complainant failed to produce any document as to the loan transaction. Thus where there is such a lacuna and where the complainant failed to set aside such lacuna whether by way of evidence or documents in my opinion the complainant failed to succeed so in the instant case.

In view of such facts and circumstances, I have no hesitation at all in collecting that no case U/s. 138 of N.I. Act has been made out against the accused person, and the complainant has miserably failed to prove his case against the accused person beyond all reasonable doubts. As a result, the accused person is entitled to get an order of acquittal.....”

Sd/-
19th Metropolitan Magistrate,
Calcutta

From the said finding of the Magistrate, it is clear that **the scope of Section 139 of the Negotiable Instrument Act has not been properly interpreted therein. In a proceeding under Section 138 N.I. Act, presumption is in favour of the Holder of the cheque and that such cheque had been issued in discharge of legal debt and/or liability, unless proved otherwise by the accused.**

In ***Oriental Bank of Commerce vs Prabodh Kumar Tewari***, **Criminal Appeal No. 1260 of 2022**, on August 16, 2022, the Supreme Court held:-

“13. Section 139 of the NI Act states:

139. Presumption in favour of holder. - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

14. In *Bir Singh v. Mukesh Kumar*, (2019) 4 SCC 197, after discussing the settled line of precedent of this Court on this issue, a two-Judge Bench held:

33. 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.

34. 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.

[...]

36. 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.

(emphasis supplied)

The above view was recently reiterated by a three-Judge Bench of this Court in ***Kalamani Tex v. P. Balasubramanian*, (2021) 5 SCC 283.**

15. A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The presumption arises under Section 139.

16. In **Anss Rajashekar v. Augustus Jeba Ananth, (2020) 15 SCC 348**, a two Judge Bench of this Court, of which one of us (D.Y. Chandrachud J.) was a part, reiterated the decision of the three Judge Bench of this Court in **Rangappa v. Sri Mohan, (2010) 11 SCC 441**, on the presumption under Section 139 of the NI Act. The court held:

12. Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression “unless the contrary is proved” indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a “reverse onus clause” the three-Judge Bench this Court in Rangappa held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:

“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.”

(emphasis supplied)

17. For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was

issued towards payment of a debt or in discharge of a liability.”

In *Rajaram S/O Sriramulu Naidu (since deceased) through L.RS. vs Maruthachalam (since deceased) through L.RS., Criminal Appeal No. 1978 of 2013, on January 18, 2023*, the Supreme Court held:-

“12. This Court in the case of ***Baslingappa v. Mudibasappa*** (supra) has summarized the principles on Sections 118(a) and 139 of the N.I. Act. It will be relevant to reproduce the same.

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

25.1. 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.

25.2. 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.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the 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.

25.4. 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.

25.5. It is not necessary for the accused to come in the witness box to support his defence.”

13. It can thus be seen that this Court has held that once the execution of cheque is admitted, Section 139 of the N.I. Act mandates a presumption that the cheque was for the discharge of any debt or other liability. It has however been held that 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. It has further been held that to rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. It has been held that 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.”

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

6. Conclusion:-

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

Considering the fact that the presumption under Section 139 N.I. Act goes in favour of the complainant unless and until rebutted by the accused in

accordance with law, the principal of Natural Justice requires that the **complaint case be remanded back to the trial court for retrial with the direction** that the Learned Magistrate shall issue notice upon both sides and allow the parties to **adduce fresh evidence** in respect of the presumption under Section 139 N.I. Act by calling for the relevant documents and proving the same in accordance with law and provide sufficient opportunity to the accused/opposite parties to rebut the said presumption and proceed accordingly in accordance with law. And on consideration of the fresh materials on record including the evidence, decide the case a fresh and pass a Judgment in accordance with law preferably **within six months** from date of communication of this order.

The appeal being CRA 154 of 2017 is accordingly allowed.

The judgment and order dated 3rd day of November, 2016, passed by the Learned Court of 19th Metropolitan Magistrate, Calcutta, in connection with Complaint Case No. 440/10 corresponding to T.R. No. 1699/14 under Section 138 of the Negotiable Instruments Act, 1881, thereby observing that the accused person is found not guilty for offence under Section 138 of the Negotiable Instruments Act, 1881, **is here by set aside.**

The Trial Court to proceed with the trial expeditiously in accordance with law on ensuring the presence of the accused persons by due process of law.

All connected applications, if any, stands disposed of.

Interim order, if any, stands vacated.

Copy of this judgment be sent to the learned Trial Court for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)