

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 178 of 2021

With

CRAN 2 of 2023

Aries Probono Publico Society

-vs.-

Mrs. Sukla Chanda

Mr. Angshuman Chakraborty,
Mr. Shivaji Mitra

...For the Complainant/Appellant

Mr. Arijit Das,
Mr. Sayan Mitra,
Mr. AmitDasgupta.

... For the Accused/Respondent.

Reserved on : 02.05.2023.

Judgment on : 16.05.2023

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of acquittal dated 16.03.2021 passed by the learned Additional Sessions Judge, 2nd Court, Sealdah in Criminal Appeal No. 49 of 2018, wherein the learned Appellate Court was pleased to set aside the order of conviction and sentence passed by the Learned Additional Chief Judicial Magistrate, Sealdah in

Complaint case no. 879 of 2007 thereby acquitting the accused/respondent from the charges under Section 138 of the Negotiable Instruments Act.

Complaint case no. 879 of 2007 was initiated under Section 138 of the Negotiable Instruments Act against the accused namely, Sukla Chanda by the appellant herein Aries Probono Publico Society (hereinafter referred to as the 'complainant Society'). The allegations made in the petition of complaint were to the effect that the complainant was Chairman of Aries Probono Publico Society having its office at Kolkata and the accused is a businesswoman who approached the Society for temporary financial assistance and the complainant Society agreed to the request of the accused by way of paying a sum of Rs.1,00,000/-in cash. The accused agreed to repay the amount on 28.09.2007 and issued an account payee cheque bearing no.301072 dated 28.09.2007 drawn on HDFC Bank Ltd. Golpark, Kolkata for a sum of Rs.1,00,000/-. The complainant Company deposited the said cheque with its banker UTI Bank Ltd. on 16.11.2007 for encashment but the said cheque was returned unpaid with the bank endorsement "insufficient fund". The intimation of dishonour was received by the complainant on 17.11.2007. The complainant Society thereafter served a demand notice through its Advocate on 27.11.2007 demanding the amount covered by the dishonoured cheque to be paid within 15 days from the date of the receipt of the notice and in spite of receipt of the notice the accused persons failed and neglected to make any payment, as such the complainant had no other option except to initiate the complaint case for commission of offence punishable under Section 138 of the N.I. Act and on such complaint

being filed the learned Court was pleased to take cognizance and issued process against the accused person.

In connection with the instant case after cognizance was taken by the learned ACJM, Sealdah process was issued and accused appeared before the learned Court and was enlarged on bail on or about 30.11.2010. The accused was thereafter examined under Section 251 of the Code of Criminal Procedure and the substance of accusation was read over and explained to the accused to which he pleaded not guilty and claimed to be tried. Prosecution in order to prove its case relied upon the complainant Achintya Kumar Niyogi as PW1 and also five documents which were marked as exhibits. The documents which the prosecution relied upon included Ext.1, Cheque bearing no.301072 dated 28.09.2007; Ext.2, Cheque return memo dated 17.11.2007; Ext.3, Legal demand notice dated 27.11.2007; Ext.4, legal demand notice sent to the accused in closed envelope; Ext.5, acknowledgement card.

In course of the hearing of the appeal an application under Section 391 of the Code of Criminal Procedure was filed at the instance of the complainant for proving certain documents which were available with the complainant but could not be produced because of mis-management of the conducting lawyer of the complaint, accordingly liberty was granted and the available additional documents were marked as exhibit which included original certificate of registration of the Society as Ext.6, original audit balance-sheet of the Aries Probono Publico Society for the period from 01.04.2007 to 31.03.2008; the

balance-sheet which was marked as Ext.7; agreement dated 08.04.2008 between the complainant Society and Accused Mrs. Sukla Chanda which was marked as Ext.8. The defence in order to rebut the prosecution evidence relied upon oral evidence of the accused who examined herself as DW1.

At this stage it would be pertinent to refer to the judgment delivered by both the trial Court and the Appellate Court. The trial Court after the prosecution evidence, examination of the accused under Section 313 of the Cr.P.C., the examination of defence evidence and after hearing arguments of both the parties was pleased by its judgment and order dated 20.09.2018 to hold the accused guilty for commission of offence under Section 138 of the N.I. Act and passed the following order:

“that the accused lady Smt. Shukla Chanda is found guilty of committing an offence under section 138 of the Negotiable Instruments Act, 1881 and is convicted under section 255(2) of the Code of Criminal Procedure Code, 1973.

The accused lady is hereby sentenced to simple imprisonment for a term of 7 days and is directed to pay compensation to the complainant-society (represented by its authorized representative) to the tune of Rs.2,00,000/- (Rupees Two Lakhs) within a period of 30 days from the date of this judgment in accordance with section 357 of the Code of Criminal Procedure, 1973 failing which the complainant-society shall be at liberty to recover the amount of compensation from the accused lady as per law.”

Aggrieved by such order the accused namely Mrs. Sukla Chanda preferred an appeal before the learned Sessions Judge being Criminal Appeal no. 49/2018 and the learned Appellate Court being Learned Additional Sessions Judge, 2nd Court, Sealdah, 24 Parganas South was pleased to set aside the order of the learned ACJM, Sealdah in C. Case No. 879/07. The learned Appellate Court was pleased to pass the following order in its judgment:

“that the Criminal Appeal No. 49 of 2018 is allowed on contest. The judgment and order dated 20.09.2018 passed by the Ld. Additional Chief Judicial Magistrate, Sealdah in C. Case No. 879 of 2007 is hereby set aside. The conviction and the sentence imposed on the appellant/accused by the Ld. Additional Chief Judicial Magistrate, Sealdah is also set aside.

Accused Smt. Sukla Chanda is found not guilty for the offence punishable U/s 138 of Negotiable Instrument Act and she is acquitted accordingly.”

Aggrieved by the judgment and order dated 20.02.2020 passed in Criminal Appeal no. 49/18 the complainant approached this Court. The learned Advocate appearing for the complainant submitted that there were no latches on the part of the complainant so far as the requirement under the statutory provisions of N.I. Act is concerned and at no point of time it was complained that there has been such violation. Learned Advocate submitted that the accused in her deposition stated that she approached the complainant for loan and issued six blank cheques which were signed by her, but the

purpose for which it was drawn was not complied with by the complainant and as such there is no enforceable debt or liability. It was pointed out that such evidence could not be proved by the accused in Court as her signature in the cheque is admitted. Learned Advocate thereafter by drawing the attention of the Court to the additional evidence pointed out that the balance-sheet (marked as Ext.7) at the relevant point of time reflected that the accused accepted loan. Learned Advocate in order to substantiate issues relating to facts and law particularly with regard to the provisions of Section 139 of the N.I. Act emphasized on the reverse onus clause and relied upon the following judgments:

Bir Singh –Vs. – Mukesh Kumar reported in (2019) 4 SCC 197; Kalamani Tex –Vs. – P. Balasubramhaniam reported in (2021) 5 SCC 283; Basalingappa – Vs. – Mudibasappa reported in (2019) 5 SCC 418; Rohitbhai Jivanlal Patel –Vs. – State of West Gujarat reported in (2019) 18 SCC 106; Oriental Bank of Commerce –Vs. – Prabodh Kumar Tewari reported in 2022 SCC OnLine SC 1089.

Learned Advocate appearing for the accused respondent submitted that the authority of the complainant to file the case remains vague and from the very inception the issue has been raised as to whether the complainant had the authority to file the complaint. Learned Advocate also tried to impress upon the Court that the registration of the Society was not existing for a substantial period of time as such the complainant who happens to be the appellant

cannot be allowed to continue with the appeal. It was also submitted on behalf of the respondent that the complainant in this case failed to show any prima facie offence being made out, as there was nothing on record to substantiate that there is any existing legally enforceable debt or liability for which the cheque has been issued. Additionally it was submitted that once the complainant failed to produce any supporting document in respect of the liability, the claim is dislodged and the prosecution case according to the learned Lawyer by way of preponderance of probability and the attending circumstances relied upon by the defence reflects that the cheque was only given as a security for the purpose of arranging loan for the accused and when the complainant failed to arrange any loan there was no scope for encashing the cheque.

Refuting the contentions of the respondent the learned Advocate for the Appellant stated that the learned Magistrate as well as the learned Appellate Court while arriving at its conclusion of guilt relied upon the part of the cross-examination of PW1 wherein the witness stated that the accused not only once but on several occasions received money from the Society. In the Month of October or November after Puja the accused verbally requested them for money, the loan issued was recorded in the Income Tax file and an agreement relating to such transaction was shown to the accused. On the other hand the accused while examining herself as a defence witness stated that she did stitching/sewing work and in order to expand her business needed loan, so she deposited her documents with the complainant, however, the said loan was to

be obtained according to her from HDFC Bank and for the said purpose, accused handed over six security cheques. However, the complainant received six signed cheques and thereafter refused to return her. Learned Magistrate while dealing with such evidence of the prosecution and the defence observed the following:

“ 1. That the accused lady was involved in a transaction liaison (loan related) with the complainant-society. In fact the accused lady admitted in her deposition/chief that she went to the complainant-society for a loan to expand her business of sewing.

2. That the accused lady was indeed a business woman as claimed by the complainant in its complaint.

3. That the accused lady issued a cheque bearing the particular number as put forth by the complainant in its complaint as well as in documentary evidence on record.

4. That the said cheque was signed by the accused lady.

5. That the said cheque was validly tendered by the accused lady to the complainant-society or in other words same was not forcibly taken from her by the complainant-society under any duress.

6. That the said cheque was drawn upon the particular branch of the particular bank as alleged by the complainant-society in his complaint.

7. That the accused lady had an account in such bank and branch of the bank.

8. That the cheque was drawn for payment from such account of the accused lady as maintained by her with the concerned bank.

9. That the cheque was presented to the bank of the complainant-society within the statutory period from the date of issuance of the same.

10. That the cheque was dishonoured by the bank of the accused lady on the ground of “insufficiency of fund.”

11. That the complainant-society served on the accused lady a legal demand notice as per statute claiming alternative payment of the dishonoured amount.

12. That the complainant-society served such notice on the accused lady within the statutory period from the date of knowledge of dishonour.

13. That the accused lady did not pay the dishonoured sum to the complainant-society by any means within the statutory period of 15 days from the date of receipt of legal demand notice.

14. That the instant case was filed by the complainant within the statutory period of 1 month from the date of expiry of 15 days allotted to the accused lady for repayment after receipt of legal demand notice.

Now, it was but plain logic that all the above facts in this case being “uncontroverted or undisputed” were “well-settled” in themselves. In tune therewith these settled facts in themselves constituted the offence under Section 138 of the N.I. Act. It was also noteworthy that no issue of limitation

was involved in this case. Thus, instant case was not barred by limitation as well.”

Learned trial Court on an assessment of such evidence and its finding was pleased to deliver its finding of guilt. On the other hand the learned Appellate Court while arriving at its finding of acquittal was of the view that the complainant did not produce any document to substantiate that such an amount of Rs.1,00,000/- was taken by the accused and/or how the said amount was transmitted to the accused, neither any audit report or any income tax report was placed before the Court to substantiate such amount being Rs.1,00,000/- advanced to the accused. The complainant in course of cross-examination stated that he would produce such documents but did not produce such documents which would show that such money was transmitted and also did not produce any document for the satisfaction of the Court that the Society had the authority to grant loan. It was further observed by the Learned Appellate Court that the prosecution witness would not show the date of the issue of the cheque and it was observed by the Appellate Court that the signature of the cheque was appearing in blue ink but the date, amount and name of the drawee as mentioned in the cheque was in another ink in writing, as such committed serious doubt whether accused at all issued the cheque in favour of the complainant. The learned Appellate Court emphasised on the reasons assigned by the accused as DW1 where she stated that the cheque was handed over as security for the complainant to arrange loan for her from HDFC Bank. It was further recorded by the Appellate Court that on being asked the

accused stated that six cheques were handed over to the complainant which were of HDFC Bank of the year 2006 by signing the same and as the complainant could not arrange any loan, she tried to contact the office the complainant who did not receive any phone call and his office was also found under lock and key. Learned Appellate Court thereafter relied upon the judgment of ***John K Abraham –Vs. – Simon C Abraham*** reported in **2014 CRLJ 2304** and observed that the burden was heavily upon the complainant to show as to who wrote the cheque. Holding that there was discrepancies in the hand writing in the cheque and various defects in the evidence of the complainant, the order of conviction and sentence so imposed was to set aside and consequently the appellant was acquitted.

I have considered the evidence of PW1 and DW1, as well as the reasons assigned by the trial Court and the Appellate Court along with the documents which were placed under Section 391 of Cr.P.C. by way of additional evidence which included cross-examination by the accused. In fact, the very foundation of the Appellate Court was that there were nothing on records to show that such an amount of Rs.1,00,000/- was paid by the complainant to the accused in cash. Now the complainant produced the auditor's report in evidence which was marked as Ext.7 wherein at a particular column the name of the accused Sukla Chanda reflected for having taken loan. By way of Ext.8 and Ext.1 which was signed both by the accused Sukla Chanda and treasurer of the Society, evidence was adduced. At the time of cross-examination it was specifically asked as to whether the Society had the authority to deal with the money, in

response to such question it was answered that the Society could receive money as donation and provide money as loan without interest and they had no licence for the same. It was also confronted at the time of cross-examination that the agreement which was signed and dated 18.04.2007 i.e. Ext.8, the signature of the accused happens to be forged. The same was by way of a suggestion, as the next question of the defence reflects that in a routine manner, it was suggested to the complainant that the cheque issued is a false cheque. At no point of time the accused by issuing a notice particularly in response to the demand notice asked the complainant for not presenting the cheque neither the circumstances show that she took any steps with the bank. No information was sent to the Bank, in fact the bank return memo reflects that the cheque was dishonoured for insufficient funds. The reasons assigned by the appellate Court regarding the date is of no consequence in view of the cheque being dishonoured not for the date or the signature difference but for insufficiency of funds and at no point of time the signature in the cheque was challenged in course of trial. It has been held in paragraph 15 and 17 of ***Oriental Bank of Commerce –Vs. – Prabodh Kumar Tewari*** reported in **2022 SCC OnLine SC 1089**:

“15. The above view was recently reiterated by a three-Judge Bench of this Court in Kalamani Tex v. P. Balasubramanian.

17. In Anss Rajashekar v. Augustus Jeba Ananth, 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*⁶ 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 of 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.”

In ***Anss Rajashekar –Vs. – Augustus Jeba Ananth*** reported in (2020)

15 SCC 348 relying upon the earlier judgment of *Rangappa –Vs.– Sri Mohan*

reported in (2010) 11 SCC 441 on the presumption relating to Section 139 of the NI Act and it was held as follows:

“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 of 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 : (SCC p. 454, para 28)

“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)”

In ***Kalamani Tex & Anr.*** reported in **(2021) 5 SCC 283** it has been held in paragraphs 17 and 18 are as follows:

“17. Even if we take the arguments raised by the appellants 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 : (SCC p. 209, para 36)

“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.”

18. Considering the fact that there has been an admitted 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 NIA.”

Considering the law laid down by the Hon'ble Supreme Court particularly in relation to the provisions of Section 139 of the NI Act in the background of the present case it can be concluded that the accused tried to create a belated defence regarding the liability and authority of the complainant to give money rather than answering regarding the agreement which was placed by way of evidence. The agreement reflects that she had taken money and there is no evidence that the cheque was obtained by way of coercion. No documents were

placed before the Court by the defence to show that she handed over the cheque for the purposes of arranging loan from HDFC Bank. Such a plea is diluted by the prosecution evidence wherein the complainant stated that the accused on several occasions had taken loan.

Having considered the reasons so assigned by the learned appellate Court in acquitting the accused, I am unable to accept such finding in view of the settled position of law. Consequently the judgment and order dated 20.02.2020 passed in Criminal Appeal No. 49 of 2018 is hereby set aside.

The judgment and order passed by the learned ACMJ, Sealdah in complaint case no 879 of 2007 thereby revives.

The respondent is directed to comply with the judgment and order dated 20.09.2018 passed by the trial Court within a fortnight from date, in the alternative the learned trial Court is directed to take steps for execution.

Accordingly, Criminal Appeal No 178 of 2021 is allowed.

Pending application, if any, is consequently disposed of.

Department is directed to send back the Lower Court Records to the Trial Court and communicate this judgment for further reference.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)