

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 593 of 2016

Kuldip Singh

Vs

M/s. G. S. Atwal & Company & Ors.

For the appellant : Mr. Milon Mukherjee,
Mr. Rahul Ganguly,
Mr. Dattatreya Dutta.

For the State : Mr. Narayan Prasad Agarwala,
Mr. Pratick Bose.

**For the Respondents/
Accused Persons No. 1 to 3** : Md. Shahjahan Hossain,
Ms. Sanjida Sultana.

Heard on : 07.07.2023

Judgment on : 25.07.2023

Shampa Dutt (Paul), J.:

1. The Appeal

The present appeal against acquittal has been preferred against the Judgment and Order dated 03.02.2016 passed by the learned Judicial Magistrate, 1st Class, 4th Court, Asansol in connection with C. Case No.357 of 2002 (T.R No.86 of 2006), thereby acquitting the accuseds/respondents of the charge under Section 138 of the Negotiable Instruments Act.

2. Appellant's Case

Mr. Milon Mukherjee, learned senior counsel for the appellant, has submitted, that the appellant/complainant's case is that the appellant is the sole proprietor of a business concern named and styled as M/s. Kuldip Service Station situated at G.T. Road, Chanda, Post Office Kali Paharia, Police Station Jamuria, District- Burdwan, dealing with petrol, diesel and lubricants and maintains one current account being No.CC 1056 with Dena Bank, Asansol Branch.

The accused persons are partners of a concern named and styled as M/s. G. S. Atwal & Co. That in course of running their business the accuseds/respondents used to purchase various kinds of petrol, diesel and lubricants on credit from the appellant and in lieu of such business, the accused persons issued a cheque bearing Cheque No.CAB00/148317/072 dated 25.04.2002 drawn on State Bank of India, Asansol Bazar Branch for Rs.35 lakhs in favour of the appellant's firm on behalf of the respondent no.1 company towards part payment of petroleum products.

The said cheque which was handed over to the appellant was placed for encashment with his banker, Dena Bank on 23.08.2002, but the same returned dishonoured on 24.08.2002.

On 04.09.2002 the appellant sent a notice under Section 138 of the Negotiable Instruments Act to the accused/respondent no.1 company, through his learned advocate by registered post with A/D demanding payment of the aforesaid sum of Rs.35 lakhs within 15 days from the date of receipt of such notice.

On 06.09.2002 the accused/respondent no.1 company received the aforesaid notice, but in spite of receipt thereof, the accused persons failed to make payment within the stipulated period as provided under the Negotiable Instruments Act.

Accordingly, the appellant filed a petition of complaint before the court of the learned Additional Chief Judicial Magistrate, Asansol on 04.10.2002 under Section 138 of the Negotiable Instruments Act against the accuseds/opposite parties.

The accuseds/respondents were examined under Section 251 of the Code of Criminal Procedure, 1973. The substance of the accusation was read over to the accuseds/respondents to which they pleaded not guilty and claimed to be tried.

The appellant, in order to prove his case examined three witnesses. The defence did not adduce any witness in their favour. The case of the defence was one of denial and false implication.

Considering the evidence on record and after hearing all the parties, the learned Magistrate was pleased by his judgment and order dated 03.02.2016 to find the accuseds/respondents not guilty of the offence punishable under Section 138 of the Negotiable Instruments Act and as such acquitted them from the said charge.

Being aggrieved by and dissatisfied with the impugned judgment and order dated 03.02.2016 passed by the learned Judicial Magistrate, 1st Class, 4th Court, Asansol in connection with C. Case No.357 of 2002 (T.R No.86 of 2006), the appellant preferred an application for Special Leave to Appeal before this Hon'ble Court therein praying for leave to file an appeal against

the aforesaid order of acquittal and the same was registered as CRMSPL No.48 of 2016.

It is submitted by the appellant that P.W 2 in his deposition has proved that the cheque in question was sent to the State Bank of India, Asansol for collection and it was dishonoured owing to 'INSUFFICIENT FUND'. P.W 3 deposed that the cheque in question was presented to their Bank namely Dena Bank, Asansol for encashment and the same was issued by the accused/respondent no.1 company. Hence, it is an established fact that the cheque which was given to the present appellant by the accuseds/respondents was presented for encashment to the aforementioned account retained by the appellant and hence, the requirement of Section 138 of the Negotiable Instruments Act that the cheque was presented before the drawer bank is fulfilled. The learned Trial Court however, erroneously interpreted the instant statutory obligations, thereby causing grave miscarriage of justice.

The accused persons had tried to prove that the cheque was the subject matter of a forgery case against the complainant being Jamuria Police Station case No.50 dated 14.05.2003 under Sections 406/420/468/469/471 of the Indian Penal Code. **The accused i.e. appellant herein was discharged from the said case by the learned Judicial Magistrate, 2nd Court, Asansol on 10.08.2012 and no appeal was preferred by the accused persons/respondents against such order of acquittal, thereby strengthening the instant case of the appellant.**

It is submitted that Dilsher Singh Atwal is the signatory of the present cheque in his **capacity as a partner** in the accused firm named and styled

as M/s. G.S. Atwal & Company. The learned trial court erroneously came to the conclusion that the signatory is not a partner and further that it is not a partnership firm.

The plea has been taken by the accuseds/respondents that the cheque had not been issued by the appellant herein against legally enforceable debt or liability.

During the examination of the accuseds/respondents under Section 313 of the Code of Criminal Procedure, the respondent no.2 pleaded that he is a sleeping partner of the partnership in the name and style of the respondent no.1 firm and he never actively participated in the daily transaction of the firm and that the respondent no.3 is not a partner of the aforesaid firm.

Even though the partnership firm was admitted by the accused, the learned court has erroneously come to the conclusion that as the partnership deed was not placed on evidence by either of the parties, it cannot be concluded that the accuseds/respondents are partners of the firm. The learned court in such circumstances, by acquitting the accuseds/respondents, has caused grave error in law, thereby rendering the impugned order bad in law and thus liable to be set aside.

That the impugned order of acquittal is otherwise bad in law and hence the same is liable to be set aside.

3. In their written notes of argument, the appellant has stated that the trial court has wrongly inferred that the appellant herein failed to give individual notices to the partners of the firm and also failed to show existence of legal business with the accused firm and hence could not justify

the ingredient that the cheque was issued in lieu of legally enforceable debt or liability. In this regard the ***Hon'ble Apex Court in Krishna Textport & Capital Markets Ltd. vs I.L.A.A. Agarwal & Ors., reported in (2015) 8 SCC 28*** has categorically held that there is no necessity or scope for issuing individual notices to Directors of the company and also if the business transaction is admitted, the requirement of enforceable debt is admitted.

It is further submitted that the learned Trial Court also failed to consider that the initial burden of proof regarding existence of legal liability has to be proved by the accused and not the complainant which has been explained by the Hon'ble Apex Court in the case of ***Hiten P. Dalal vs Bratindranath Banerjee, reported in (2001) 6 SCC 16*** and ***Rangappa vs Sri Mohan, reported in (2010) 11 SCC 441***. That the presumption under Section 139 of the Negotiable Instruments Act is a presumption of law and not of fact. The presumption has to be raised by the Court in all cases once the factum of dishonor is established. The onus of proof to rebut this presumption lies on the accused. The standard of such rebuttal evidence depends on the facts and circumstances of each case. Such evidence must be sufficient, cogent and should prove beyond any reasonable doubt. Therefore a mere explanation is not enough to repel this statutory presumption of law. The Court also has to take into account Section 118 of the Negotiable Instruments Act which states that until contrary is proved, the Court shall make presumptions as to consideration, date, time of acceptance, transfer and that the holder of a negotiable Instruments is a holder in due course. That by virtue of Section 118 of the Negotiable Instruments Act the Court is obliged to presume that the promissory note is

made by consideration until the contrary is proved and the initial burden lies on the accused to prove the non existence of such consideration.

The said judgments of the Supreme Court have been relied upon.

4. Defence Case

Md. Shahjahan Hossain, learned counsel for the respondent/accused persons no. 1 to 3 has also submitted by filing his written notes of argument that the instant appeal is not maintainable in the eye of law and fact as against the opposite parties no. 2 and 3 since they have got no connection with the company and its day to day affairs of the business and the complainant being the PW 1 admitted the same in his examination before the trial court and thus learned court rightly acquitted them from the charge of the instant case.

The complainant could not prove any legal enforceable debt and in discharge of the same the opposite parties or any designated/authorized person of opposite parties had ever issued the cheque and thereby the learned trial court rightly acquitted the opposite parties from the instant case.

The following judgments have been relied upon:-

- (1) ***M.S. Narayan Menon vs The State of Kerala*** (2007) 1 C CR L R (SC) 364.
- (2) ***Green Earth Asphalt and Power Private Limited vs The State of Maharashtra Through PSO & Ors.*** (2008) S C CR L R (SC) 469.
- (3) ***S.M.S. Pharmaceuticals Ltd. vs Neeta Bhalla*** (2005) 2 C CR L R (SC) 457.

5. Mr. N. P. Agarwala, learned counsel has appeared for the State.

6. Evidence

P.W. 1, is the complainant/appellant. He on oath has proved the following:-

- a) Cheque(exhibit 1) in this case for Rs.35 lakhs.
- b) Cheque return memo (2) Exhibit 2 and 3.
- c) Copy of Demand Notice etc. (Exhibit 4 series).

The statement of P.W 1 on being cross examined, that he could not recollect all the averment in the complaint is for deposing after five years.

P.W 2 and 3 are Bank officials who have proved that the cheque in this case, issued in the petitioner's name was in/part of the cheque book issued in the name of the accuseds and was deposited by the petitioner and was also dishonored for “insufficient fund”.

On being examined under Section 313 of Cr.P.C., the accused persons have only pleaded ignorance. The notice in this case was also duly served on 06.09.2002 (Exhibit 4/2).

Exhibit-A, is the counter part of the cheque proved on behalf of the defense. The date of issuance of the cheque as seen is 25.01.2002.

7. Analysis of Evidence

Evidence on record shows, that the cheque was issued in favour of 'Kuldip Service Station' (complainant) on 25.01.2002. The cheque (Exhibit-1) bears the date 25.04.2002. **Thus, the accuseds alleging forgery of the said date on the cheque filed a criminal case against the petitioners. The case was dismissed and the petitioners were acquitted.**

Admittedly, the cheque was not seized in the said criminal case for alleged forgery. **In the said case, the accuseds did not pray for**

examination by a handwriting expert and report as to the alleged tampering with the date on the cheque (Exhibit 1 and A), where the month (1) has been allegedly made into (4) to extend the time.

Exhibit-1 shows that the cheque was issued by the accused firm /respondent and was **signed by one of the partners** in favour of the complainant.

One defence pleaded is that the said partner being a sleeping partner, is thus not liable. Nothing is on record to substantiate the said statement.

The Supreme Court in ***Mohd. Laiquiddin and Anr. Vs Kamala Devi Misra (Dead) by L.Rs & Ors., Civil Appeal Nos. 6933-6934 of 2002 with Smt. Kamala Devi Misra (Dead) by L.Rs & Ors. vs. Mohd. Laiquiddin Khan and Anr., Civil Appeal Nos. 4411-4412 of 2002, on January 05, 2010***, held:-

*“38. In the case of **Narayanappa v. Krishtappa**, [(1966) 3 SCR 400], the issue was whether on relinquishment of rights by partners of an erstwhile partnership, there was a transfer of immovable property, which required to be registered to constitute a valid transfer. This Court observed:*

“No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own...His right is to obtain such profits, if any, as fall to his share from time to time and upon dissolution of the firm to share in the assets of the firm which remain after satisfying the liabilities set out in S.48. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property...The person who brought it in would, therefore, not be able to claim any exclusive right over any property which he has brought in, much less over any other partnership property.”

39. This principle was reiterated in the case of **Malabar Fisheries Co. Calicut v. CIT**, [(1979) 4 SCC 766].

40. In the case of **S.V. Chandra Pandian v. S.V. Sivalinga Nadar** [(1993) 1 SCC 589], this Court held that:

“In the entire asset of the firm all the partners have an interest albeit in proportion to their share and the residue, if any, after the settlement of accounts on dissolution would have to be divided among the partners in the same proportion in which they were entitled to a share in the profit... The mode of settlement of accounts set out in Section 48 clearly indicates that the partnership asset in its entirety must be converted into money from the pool disbursement has to be made...”

It is well settled that a sleeping partner's liability is unlimited and he is also liable for the losses of the business.

The trial court's finding that “..... the accused has raised a probable defense which creates a doubt about the existence of legally enforceable debt or liability which the prosecution has failed to clarify.....” is against the provision as laid down in Section 139 of the N.I. Act.

Section 139 of the Negotiable Instrument Act :-

“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.”*

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 v. Mukesh Kumar, (2019) 4 SSC 197.***

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 SSC 287.***

The Supreme Court in **Criminal Appeal No (s) – 292 of 2021, SUMETI VIJ Vs M/S PARAMOUNT TECH FAB INDUSTRIES, on 09th March 2021** relied on several precedents and observed :-

“13. The object of introducing Section 138 and other provisions of Chapter XVII in the Act appears to be to enhance the acceptability of cheques in the settlement of liabilities. The drawer of the cheque be held liable to prosecution on dishonour of cheque with safeguards provided to prevent harassment of honest drawers. Section 138 primarily relates to a civil wrong and the amendment made in the year 2000 specifically made it compoundable. The burden of proof was on the accused in view of presumption under Section 139 of the Act and the standard of proof was of “preponderance of probabilities”. The N.I. Act including a cheque carrying a presumption of consideration in terms of Sections 118(a) and 139 of the Act which is related to the purpose referred to and reads as under:-

“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;

* * * * *

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. There is a mandate of presumption of consideration in terms of the provisions of the Act and the onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act, which 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 8 [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, [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.”

15. *The scope of Section 139 of the Act is that when an accused has to rebut the presumption, the standard of proof for doing so is that of “preponderance or probabilities” which has been examined by a three-Judge Bench of this Court in **Rangappa vs. Sri Mohan 3 (2010) 11 SCC 441**, which reads 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 [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

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 defendant-accused cannot be expected to discharge an unduly high standard or proof.”*

16. *It is well settled that the proceedings under Section 138 of the Act are quasi-criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.*

17. Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved. In **Rohitbhai Jivanlal Patel vs. State of Gujarat and Another⁴**, this Court has examined the scope of Sections 138 and 139 of the Act, which reads as under:-

“15. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 of the NI Act is concerned, apparent it is that the appellant-accused could not deny his signatures on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs 3 lakhs each. The said cheques were presented to the bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The trial court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e. the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the appellant accused to establish a probable defence so as to rebut such a presumption.

* * * * *

17. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasised that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfill the requirements of rebuttal as envisaged under Sections 118 and 139 of the NI Act. This

Court stated the principles in **Kumar Exports [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513]**

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

8. Conclusion

In the present case, the accused persons could not/did not discharge their liability under Section 139 of the N.I Act.

The complainant has proved the issuance of the cheque by the accused firm by a partner. No evidence otherwise has been adduced. The dishonour of the cheque and the due service of notice has also been duly proved. Thus, the findings of the trial court being not in accordance with the evidence on record and with law is liable to be set aside. The cheque is of the year 2002. More than 20 years have passed. The complainant has proved his case against the accuseds/respondents by way of oral evidence and documents.

CRA 593 of 2016 is thus allowed.

The Judgment and Order dated 03.02.2016 passed by the learned Judicial Magistrate, 1st Class, 4th Court, Asansol in connection with C. Case No.357 of 2002 (T.R No.86 of 2006)under appeal is set aside.

The accuseds/respondents no. 1 to 3 are found guilty and convicted of offence punishable under Section 138 of the N.I. Act and sentenced to pay compensation of Rs.50 lakhs within one month from the date of this order, in default to suffer simple imprisonment for a period of one year in respect

of respondents/accuseds no.2 and 3 and attachment in respect of the respondent/accused no.1 firm.

All connected applications, if any, stands disposed of.

Interim order, if any, stands vacated.

Let a 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.)