

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 79 of 2001

Sri Somnath Paul

-Vs-

Sri Debasish Dey & Anr.

For the Appellant : Mr. Devi Priya Mitra

For the Respondent/
Opposite party No.1 : Mr. Kali Kinkar Dey

For the State :Mr. Bidyut Kumar Roy

Heard on : 10.01.2024, 07.03.2024, 14.06.2024

Judgment on : 08.08.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order of acquittal dated 11.08.2000 passed by the Learned Judicial Magistrate, 9th Court, Alipore in Case No. C-736/96 arising out of T.R.222/96 in a proceeding under Section 138 of the Negotiable Instruments Act, 1988.
2. The narrative of the complaint inter alia revealed that the appellant and the opposite party no.1 were acquainted with each other concerning sale and purchase of shawl. Out of the said business transaction Rs.1,60,000/- was to be paid by the opposite party no.1 to the appellant. On demand by the opposite party no.1 failed and neglected to pay the same. Lastly, on

06.03.1996 a salish was conducted and the opposite party no.1 in writing undertook to pay the said amount of money by installment and accordingly the opposite party no.1 issued a cheque of Rs.20,000/-, being Cheque No.200610 dated 06.03.1996 on Canara Bank, Gariahat Branch, Calcutta in favour of the appellant. The appellant deposited the said cheque at his account at Dena Bank, Kankulia Road Branch on 08.03.1996 for encashment but the said cheque was dishonoured and returned to the appellant with the remark "funds insufficient". After receiving the said intimation from the bank, the appellant through his Learned Advocate issued notice on 15.03.1996 and demanded the said amount of money. The said notice was received on 18.03.1996 but in spite of that the opposite party no.1 failed and/or neglected to pay the said amount. The appellant subsequently filed the complaint to initiate a proceeding under Section 138 of the Negotiable Instruments Act bearing Case No. C-736/96.

3. The appellant examined himself as PW-1, PW-2 was Subhas Mazumdar, an Officer of Dena Bank, PW-3 was Shyamal Ghosh, Manager of Canara Bank, PW-4 Basudev Paul, whereas the opposite party examined none.
4. The Learned Magistrate on completion of trial, by judgment and order dated 11.08.2000 passed an order of acquittal in favour of the opposite party no.1.
5. The Learned Advocate for the appellant submitted that the provisions under Section 138 of the Negotiable Instruments Act as far as the issuance of demand notice was concerned, the appellant-petitioner complied with the same.

6. The Learned Advocate for the appellant-petitioner explained the elements of Section 138 and Section 142 of the Negotiable Instruments Act further indicating the notification issued by the Reserve Bank of India.

7. The Learned Advocate for the appellant relied on the following decisions:-

- i. K. Bhaskaran v. Sankaran reported in (1999) 7 SCC 510, & In Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders reported in AIR 2001 SC 676.
- ii. State of M. P. v. Hira Lal reported in (1996) 7 SCC 523 as well as in Jagdish Singh v. Nathu Singh reported in AIR 1992 SC 1604.
- iii. C.C. Alavi Haji v. Palapetty Muhammad & Anr. reported in (2007) 6 SCC 555.
- iv. Sankar Finance and Investment v. State of A.P. & Others reported in (2008) 8 SCC 536.
- v. Basalingappa vs. Muudibasappa (Criminal Appeal No. 636 of 2019).
- vi. Rohitbhai Jivanlal Patel v. State of Gujarat reported in 2019 (5) SCALE 138.
- vii. Hiten P Dalal v. Bratindranath Banerjee reported in (2001) 6 SCC 16.

8. It was further submitted that:-

- i. The accused had failed to establish that the cheque in question was not given to the complainant forcefully or the complainant had made him sign on the cheque by fraud, coercion or threat as evidence from the deposition under Section 313 of the Criminal

Procedure Code. The bank officers: PW2 (Subhas Majumder an officer of Dena Bank), PW3 (Shyamal Ghosh Manager of Canara Bank), PW4 (Basudeb Paul) who were also examined as a prosecution witnesses supported the prosecution story which the ingredients of section 138 N.I. Act attracts.

- ii. The Learned Chief Judicial Magistrate at Alipore had wrongly acquitted the accused person and his order of acquittal must be set-aside by the Hon'ble Court.

9. The Learned Advocate for the opposite party no. 1 opposed the contention of the Learned Advocate for the appellant and referred to the evidence of the prosecution witnesses. It was further submitted that the demand notice was not served the accused during the examination under Section 313 Cr.P.C. denied having received any notice since the service of notice was surrounded by clouds and these clouds/doubts did not give a clear picture about service of notice. Rather it showed that the notice was not served.

10. The Learned Advocate for the opposite party no. 1 relied on the following decisions:-

- i. 1996 Cri LJ 180.

11. It was further submitted that *"If service of demand notice has not been proved, the accused in proceedings under section 138 NI Act is entitled to be acquitted (1996) 2 All Cri LR 497 Kerala (AIR Manual 5th Edition Volume 36 Page 215).*

In view of the above facts and circumstances, it is clear that the prosecution failed to establish the service of notice and the accused

person under this situation is entitled to an order of acquittal. In view of this fact, the discussion on the above points as stated above becomes in consequential and of little value and I feel that further decision is not warranted.

Nevertheless, it is seen that the cheque was presented for clearance the same was dishonoured due to insufficiency of.

Funds and thereafter notice was sent though not served as per discussion above, and the case was filed thereafter.

In view of all these facts, the prosecution case fails."

12. The Learned Advocate for the accused-opposite party no. 1 submitted the Learned Trial Court rightly acquitted the accused person and the appeal shall be dismissed.

13. A circumspection of the prosecution witnesses revealed as follows:

- i. PW-1 in his deposition stated that accused used to deal in business of shares with him. Rs.1,60,000/- was due and payable by accused to him. As a result there was a settlement of payment and then accused issued him a cheque of Rs.20,000/- dated 06.03.96 drawn on Canara Bank, Gariahat branch being cheque no. 200610 and it was further settled that balance amount be paid by accused by installment. The said cheque bearing in signature of accused who signed it in his presence was marked as (exbt.-1). The cheque was deposited at Dena Bank, Kankulia Road Branch for encashment and the same was dishonoured due to insufficient fund as per intimation of the concerned bank. The said intimation was marked "X" for

identification. Then PW-1 sent legal notice to the accused by registered post with A/D. A/D was duly served upon accused.

Copy of legal notice, postal receipt and acknowledgment card bear the signature of the accused, marked as exbt.-3 series.

Thereafter the accused did not pay any dues. Hence he filed the case. The agreement bearing the signature of the accused and witnesses signed in his presence was marked (exbt.-4).

- ii. PW-1 in his cross-examination stated he had no licence as a share broker. He did not know whether without licence a man could be a share broker. He had no office. He did not have any office, or income tax file and he did not maintain record.
- iii. PW-2 in his deposition stated he was an officer of Dena Bank, Kakulia Road Branch. He had been duly authorized by his Branch Manager to depose. He brought one cheque return memo bearing cheque no.200610 dated 06.03.96 of Rs.20,000/- drawn on Canara Bank, Gariahat branch issued in favour of Somnath Paul. It was deposited in their branch for encashment, which was returned unpaid with the reasons "fund insufficient". After having got the information from Canara Bank their branch issued one return memo relating to the bounced cheque. The return memo bearing his signature was marked (exbt.-5). The information of Canara Bank (marked 'Y' for identification).
- iv. PW-3 in his deposition stated he was the manager of Canara Bank, Gariahat branch. Witness identified the cheque dated 06.03.96 of

Rs.20,000/- (already marked exbt.-1). Debasis Deb issued that cheque (exbt.-1) whose account no. was S/B 9018. He identified Exbt.-1 dishonoured and Exbt.-4 after objection.

- v. PW-4 in his deposition stated that he was a practicing advocate in Alipore Judge's Court. Complainant was his younger brother. Initially cordial relationship existed between the parties, for selling share certificates. An amount of Rs.1,60,000/- was due from accused to complainant for dealing in share certificates. Accused did not pay the same. For which a Salishnama was organized on 06.03.96 and accused gave an undertaking repay the same on 06.03.96. He was present at the time of execution of that undertaking. He was one of the witnesses to that undertaking. Goutam Bagchi and Kanchan Paul were other witnesses. Accused signed on that undertaking in his presence marked (exbt.-4/1). On that day the accused issued a cheque of Rs.20,000/- drawn on Canara Bank which was dishonoured subsequently.
- vi. PW-4 in his cross-examination stated that since 1982 he was practicing. He had been practicing as an Advocate for last 18 years. Without seeing the exhibit-4 he could not say in whose name the stamp paper was purchased and on which date it was purchased. He could not say who had purchased it. 5 persons were present at the Salishi including the petitioner and the accused and himself. There were two other persons named Gautam Bagchi and Kanchan Pal. He knew Gautam Bagchi. He did not know Kanchan Pal. The salishi was

held in accused person house. It was at school road but he could not say the premises no. Kanchan Pal was the person who was his neighbor. He did not know whether any civil suit has been filed or not for reliasation of the said amount. His brother and he lived in the same mess. He had never instructed him as a brother or as an advocate to file any civil suit. He could not say whether there was any other document to show that his brother will get Rs.1.6 lakh from the accused persons or not.

14. The Learned Trial Court in the impugned judgment inter alia opined as follows:-

“This is the only oral evidence regarding the service notice. (illegible) my attention was drawn to Exhibit 3(1). AD card (torn). The AD card was not signed by the accused Debasish De. Rather it was signed by one “Bhattacharya” for D.De. The Ld. Advocate submitted that this is in sharp contradiction to the oral evidence of PW-1. PW-1 very categorically stated that the accused received the notice by putting his signature and that the said was the AD card bearing the signature of the accused. Perhaps the PW-1 did not see the AD card properly. It had no signature of the accused. The oral evidence was given without seeing the AD. This clearly shows that the accused (torn) in fact did not receive the notice personally by signing the AD card.

There is no explanation as to who the said “Bhattacharya” is and whether the receipt by the said person in fact was a indirect receipt by the accused person. There is no evidence on this point.

All these facts clearly show that the notice was not served.

The ld. Advocate of the complainant, however argued very strongly that there was no denial in the cross-examination of PW-1 about the non-service of notice. Well it is true that no cross-examination, or suggestion was put in this regard; but then the accused during the examination under Section 313 Cr.P.C denied having receipt any notice. This also supports the accused person's case.

Be that as it may, ours is an accusatorial type of criminal justice system and the burden of proof is totally on the prosecution to prove the case beyond reasonable doubt and the slightest (illegible) in the Court's mind should go in favour of the accused.

Here the instant case, the service of notice is surrounded by clouds and these clouds/doubts do not give a clear picture about service of notice. Rather it shows that the notice was not served.

In a decision reported in 1991 Civil J 3010 it was held that if notice making demand for payment or not served upon the drawer, it tantamounts to Non-compliance of mandatory provision of sub clauses (b) and of Section 138 and conviction is not sustainable.

In another decision reported in 1996 Cri LJ 180, it was held that "where notice of demand as required under Section 138(b) was not served at all, no cognizance and prosecution of offence was punishable."

In an yet another decision it was held that “If service of demand notice has not been proved, the accused in proceedings under Section 138 NI Act is entitled to be acquitted (1996) 2 All Cri LR 497 Kerala (AIR Manual 5th Edition Volume 36 Page 215).

In view of the above facts and circumstances, it is clear that the prosecution failed to establish the service of notice and the accused person under this situation is entitled to an order of acquittal. In view of this fact, the discussion on the above points as stated above becomes in consequential and of little value and I feel that further decision is not warranted.

Nevertheless, it is seen that the cheque was presented for clearance (illegible) the same was dishonoured due to insufficiency of funds and thereafter notice was sent, though not served as per discussion above, and the case was filed thereafter.

In view of all these facts, the prosecution case fails.

Hence it is

ORDERED

That the accused person is found not guilty of the offence under Section 138 NI Act and is acquitted under Section 255(1) Cr.P.C. and is also released from his bail bond.”

15. The Learned Trial Court acquitted the accused person exclusively on the ground of non-service of demand notice.

16. The accused/opposite party no. 1 answered the following questions during his examination under Section 364 of the Criminal Procedure Code.

“Q3. Petitioner No. 1 Somnath Pal in his evidence said that on 6.3.96 you handed over a cheque to him bearing no.200610 of Rs. 20000/- drawn on Canara Bank, Gariahat Branch, to meet your liability. Do you want to say anything?”

A. Cheque was taken out before me and was being signed.

Q.4. Petitioner no.1 also stated that he deposited that cheque (exhibit - 1) in his account in Dena Bank for clearance but due to insufficient funds the cheque was dishonoured. Do you want to say anything?”

A. Money was there in my account. He knew that.

Q5. Petitioner no.1 further stated that he had sent you a Demand Notice with Registered Post A/D and you received that Notice. Do you want to say anything?”

A. No, I did not receive any notice.

Q6. Petitioner no.1 further stated that even after receiving the Notice, you did not give him the cheque amount. Do you want to say anything?”

A. He did not get (illegible) to use.

Q7. Petitioner no.2 Dena Bank’s officers stated that the petitioner had deposited the cheque at their Branch for clearance, but due to insufficient funds the same was not cleared. Do you want to say anything?”

A. I had no money.

Q8. Petitioner no.3 Canara Bank’s Manager of Gariahat Branch stated that they received the cheque of Dena Bank of your account, but due to insufficient funds it was dishonoured.

A. No.

Q9. Petitioner no.4 Basudev Paul stated that he is aware of this incident. Do you want to say anything?

A. No, he does not know anything.

Q10. Do you want to say anything regarding the incident?

A. He does not get any money from me, forcefully, he made me sign on the cheque and made me write on the stamp paper.”

17. Section 139 of the Negotiable Instruments Act, 1881 states as follows:-

“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.

18. The Hon’ble Supreme Court observed the following in **Shiv Kumar v. Ramavtar Agarwal**¹:-

“4. Mr Mahesh Jethmalani, learned Senior Counsel appearing for the appellant contends that the Judicial Magistrate First Class could have examined the materials filed along with the complaint and from the materials which were brought on the record it was clear that there was no legally enforceable debt, hence there was no case for taking cognizance of the offence and registering the criminal complaint. He referred to the agreement dated 21-10-2014 Annexure P-2 between the parties. The learned counsel for the appellant has also referred to the judgment of the High Court and specifically paras 23 and 32. The High Court in paras 23 and 32, which has been relied and referred to by the counsel for the appellant, observed: (Shiv Kumar case [Shiv Kumar v. Ramavtar Agrawal, 2016 SCC OnLine Chh 2121] , SCC OnLine Chh)

¹ (2020) 12 SCC 500

“23. The presumption available under Section 139 of the NI Act has to be rebutted and that rebuttal can only be done after adducing evidence. This, by itself clearly reflects that the rebuttal presumption cannot be looked into at the stage of the Court taking cognizance of the offence and registering the case: all that Court would have to see is whether there is a prima facie case made out meeting the conditions precedent as envisaged under Section 138 of the NI Act, which in the instant case, in the opinion of this Court, the respondent has in fact been able to establish and fulfil all such ingredients.

32. As has been stated in the preceding paragraphs since there is a presumption to be drawn of there being a debt or liability in part or in whole of the drawer to the holder of the instrument, the court below cannot be said to have faulted upon in taking cognizance and in registering the offence. Since it is a rebuttal presumption and all the contentions and averments made by the counsel for the petitioner being his defence, it would be open for him to raise all these grounds at the stage of leading evidence including the defence of existence of legally enforceable debt or liability. However, there can be no doubt that at the time of filing of complaint there was always initial presumption which would be in favour of the complainant.”

We are in full agreement with the opinion of the High Court expressed in the abovenoted paragraphs which has been referred by the learned counsel for the appellant. It is well settled that the rebuttal can be made with reference to the evidence of the prosecution as well as of defence.

5. *We, thus, at this stage do not find any error in the impugned judgment [Shiv Kumar v. Ramavtar Agrawal, 2016 SCC OnLine Chh 2121] of the High Court dismissing the criminal miscellaneous petition. With these observations, the appeal is dismissed. However,*

it shall be open for the appellant to raise all his pleas before the trial court.”

19. The Hon’ble Supreme Court in **ANSS Rajashekar v. Augustus Jeba Ananth**² observed 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 [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] 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)

² (2020) 15 SCC 348

20. The Hon'ble Supreme Court observed the following in **Rajesh Jain v. Ajay Singh**³:-

“34. Section 139 of the NI Act, which takes the form of a “shall presume” clause is illustrative of a presumption of law. Because Section 139 requires that the Court “shall presume” the fact stated therein, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary as is clear from the use of the phrase “unless the contrary is proved”.

35. The Court will necessarily presume that the cheque had been issued towards discharge of a legally enforceable debt/liability in two circumstances. Firstly, when the drawer of the cheque admits issuance/execution of the cheque and secondly, in the event where the complainant proves that cheque was issued/executed in his favour by the drawer. The circumstances set out above form the fact(s) which bring about the activation of the presumptive clause. [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal, (1999) 3 SCC 35]]

36. Recently, this Court has gone to the extent of holding that presumption takes effect even in a situation where the accused contends that a blank cheque leaf was voluntarily signed and handed over by him to the complainant. [Bir Singh v. Mukesh Kumar [Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197 : (2019) 2 SCC (Civ) 309 : (2019) 2 SCC (Cri) 40]]. Therefore, mere admission of the drawer's signature, without admitting the execution of the entire contents in the cheque, is now sufficient to trigger the presumption.

37. As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for

³ (2023) 10 SCC 148

discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.

38. John Henry Wigmore [John Henry Wigmore and the Rules of Evidence : The Hidden Origins of Modern Law] on Evidence states as follows:

“The peculiar effect of the presumption of law is merely to invoke a rule of law compelling the Jury to reach the conclusion in the absence of evidence to the contrary from the opponent but if the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption ‘disappears as a rule of law and the case is in the Jury's hands free from any rule’.”

39. *The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of “preponderance of probabilities”, similar to a defendant in a civil proceeding. [Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184 : AIR 2010 SC 1898]]*

40. *In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words “until the contrary is proved” occurring in Section 139 do not mean that the accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but*

the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist.

[Basalingappa v. Mudibasappa [Basalingappa v. Mudibasappa, (2019) 5 SCC 418 : (2019) 2 SCC (Cri) 571 : AIR 2019 SC 1983] ; see also Kumar Exports v. Sharma Carpets [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513 : (2009) 1 SCC (Civ) 629 : (2009) 1 SCC (Cri) 823]]

41. *In other words, the accused is left with two options. The first option—of proving that the debt/liability does not exist—is to lead defence evidence and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case. The preponderance of probability in favour of the accused's case may be even fifty-one to forty-nine and arising out of the entire circumstances of the case, which includes : the complainant's version in the original complaint, the case in the legal/demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his Section 313CrPC statement or at the trial as to the circumstances under which the promissory note/cheque was executed. All of them can raise a preponderance of probabilities justifying a finding that there was “no debt/liability”. [Kumar Exports v. Sharma Carpets [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513 : (2009) 1 SCC (Civ) 629 : (2009) 1 SCC (Cri) 823]]*

42. *The nature of evidence required to shift the evidential burden need not necessarily be direct evidence i.e. oral or documentary evidence or admissions made by the opposite party; it may comprise circumstantial evidence or presumption of law or fact.*

43. *The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift to the complainant. It is open for him to also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact. In Kundan Lal case [Kundan Lal Rallaram v. Custodian (Evacuee Property), 1961 SCC OnLine SC 10 : AIR 1961 SC 1316] when the creditor had failed to produce his account books, this Court raised a presumption of fact under Section 114, that the evidence, if produced would have shown the non-existence of consideration. Though, in that case, this Court was dealing with the presumptive clause in Section 118 NI Act, since the nature of the presumptive clauses in Sections 118 and 139 is the same, the analogy can be extended and applied in the context of Section 139 as well.*

44. *Therefore, in fine, it can be said that once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption “disappears” and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his complaint case. Thereafter, the presumption under Section 139 does not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. [Basalingappa v. Mudibasappa [Basalingappa v. Mudibasappa, (2019) 5 SCC 418 : (2019) 2 SCC (Cri) 571 : AIR 2019 SC 1983] ; see*

also, *Rangappa v. Sri Mohan* [*Rangappa v. Sri Mohan*, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184 : AIR 2010 SC 1898]]”

21. In **C.C. Alavi Haji v. Palapetty Muhammed⁴**, the Hon’ble Supreme Court observed the following:-

“14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement “refused” or “not available in the house” or “house locked” or “shop closed” or “addressee not in station”, due service has to be presumed. (*Vide Jagdish Singh v. Natthu Singh* [(1992) 1 SCC 647 : AIR 1992 SC 1604] ; *State of M.P. v. Hiralal* [(1996) 7 SCC 523] and *V. Raja Kumari v. P. Subbarama Naidu* [(2004) 8 SCC 774 : 2005 SCC (Cri) 393] .) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the court to draw presumption or

⁴ (2007) 6 SCC 555

inference either under Section 27 of the GC Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the court is required to be prima facie satisfied that a case under the said section is made out and the aforementioned mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

16. *As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In Vinod Shivappa [(2006) 6 SCC 456 : (2006) 3 SCC (Cri) 114] this Court observed: (SCC p. 462, para 13)*

“One can also conceive of cases where a well-intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within

the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.”

17. *It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case [(1999) 7 SCC 510 : 1999 SCC (Cri) 1284] if the “giving of notice” in the context of Clause (b) of the proviso was the same as the “receipt of notice” a trickster cheque drawer would get the premium to avoid receiving the notice*

by adopting different strategies and escape from legal consequences of Section 138 of the Act.

18. *In the instant case, the averment made in the complaint in this regard is:*

“Though the complainant issued lawyer's notice intimating the dishonour of cheque and demanded payment on 4-8-2001, the same was returned on 10-8-2001 saying that the accused was ‘out of station’.”

True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by “registered post acknowledgement due”. But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that “the addressee was abroad”. We are of the view that on facts in hand the requirements of Section 138 of the Act had been sufficiently complied with and the decision of the High Court does not call for interference.”

22. The accused-respondent stated to have not received any demand notice in reply to question no.5 during his examination under Section 364 of the Criminal Procedure Code. Though there was ample evidence of the demand notice being communicated to him through registered post along with acknowledgement due. The lower court record evinced summons being issued to the respondent, pursuant to which he appeared before the Learned Trial Court. The accused-respondent did not pay the disputed sum of money to the appellant-petitioner which he could have, if he intended to. After receiving the summons from the Trial Court, the accused-respondent could not have denied his knowledge of repayment in view of the issued cheque as aforesaid. The accused-respondent abdicated his responsibility to repay the

cheque amount in the disguise and garb of being oblivious of non-receiving the demand notice.

12. Moreover, the accused-respondent did not endeavour to rebut the presumption through proper evidence disowning his liability to discharge a legally enforceable debt. In reply to question no.10 as aforesaid, the accused-respondent stated that the appellant-petitioner was not entitled to receive any money from him and he was forcefully compelled to sign on the cheque and write on the stamp paper. The claim of the accused-respondent of coercively obtaining his signature on the cheque as well as impelled to write on the stamp paper was not incidentally and immediately reported to the police for proper action. Such a statement of the accused-respondent before the Trial Court after a lapse of time cannot be relied upon. The accused-respondent having failed to rebut the presumption under Section 139 of the Negotiable Instruments Act and should not have been acquitted of the alleged offence.
13. In view of the cited decisions and the discussions, the prosecution has failed to establish its case beyond reasonable doubt and as such the criminal appeal is allowed. The impugned judgment and order of acquittal dated 11.08.2000 passed by the Learned Judicial Magistrate, 9th Court, Alipore in Case No. C-736/96 arising out of T.R.222/96 in a proceeding under Section 138 of the Negotiable Instruments Act, 1988 is set aside.
14. Accordingly, the instant criminal appeal being CRA 79 of 2001 is disposed of.
15. There is no order as to costs.

16. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
17. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)