

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 887 of 2019

Paresh Manna

Vs

The State of West Bengal & Anr.

For the Petitioner (Legal Aid) : Mr. Satadru Lahiri,
Mr. Safdar Azam,
Mr. Syed Wasim Faruque,
Mr. Jyotirmay Talukder.

For the State : None.

For the Opposite Party No. 2 : Mr. Aritra Bhattacharya.

Hearing concluded on : 19.02.2024

Judgment on : 19.03.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against a Judgment and Order dated February 22, 2019 passed by the Court of the Learned Additional Sessions Judge, Raghunathpur at Purulia, in connection with Criminal Appeal No. 03 of 2017 thereby affirming the Judgment and Order dated July 19, 2017 passed by the Learned Magistrate, 1st Court, Raghunathpur, Purulia in C. Case No. 39 of 2006 under Section 138 of the Negotiable Instruments Act, 1881 and convicting the petitioner under Section 255(2) of the Code of Criminal Procedure, 1973 for Commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and sentencing the petitioner to suffer simple imprisonment for one year and to pay compensation of Rs. 10 lakhs to the Opposite Party no.2 within two months from the date of the Order, in default, to suffer rigorous imprisonment of further two months.
2. The petitioner's case is that on September 26, 2006, the Opposite Party no. 2 herein filed a petition of complaint under Section 138 of the Negotiable instruments Act, 1881 (hereinafter referred to as 'NI Act') against the petitioner before the Court of the Learned Additional Chief Judicial Magistrate, Raghunathpur, Purulia.
3. On Completion of trial, the petitioner was convicted and sentenced as above.

- 4.** Being aggrieved by and dissatisfied with the impugned Judgment and Order dated July 19, 2017 passed by the Learned Trial Magistrate, the petitioner herein filed an appeal under Section 374 of Cr.P.C. being Cri. Appeal No. 03 of 2017 before the Court of the Learned Additional Sessions Judge, Raghunathpur, Purulia (hereinafter referred to as 'Learned Appellate Court'). The said appeal was finally heard and disposed of by the Learned Appellate Court vide Order dated February 22, 2019 thereby affirming the Judgment and Order dated July 19, 2017 passed by the Learned Trial Magistrate.
- 5.** The petitioner states that the impugned Judgment and Order dated February 22, 2019 passed by the Learned Appellate Court is cryptic and devoid of any consideration. The Learned Appellate Court has not come to an independent finding regarding conviction of the petitioner. It is well settled that an Appellate Court has a statutory obligation to assess the evidence and to come to an independent finding.
- 6.** The petitioner states that the Learned Appellate Court has failed to consider that the first and foremost ingredient of Section 138 of the NI Act is that the subject cheque must be backed by existing legal debt/liability of the drawer. The Opposite Party no.2 has to prove beyond reasonable doubt that the subject cheque is backed by the existence legal debt/liability of the petitioner. In the present case, on behalf of the prosecution no document at all has been legally proved to show that the

subject cheque was issued by the petitioner in discharge of any legally enforceable debt or liability.

7. That throughout the entire length and breadth of the Judgment and Order impugned, it is apparent that the Learned Appellate Court took a preconceived notion about the existence of the purported legal debt and/or liability in favour of the Opposite Party no.2 and passed the impugned Judgment and Order.
8. The petitioner states that the Learned Appellate Court has failed to consider that Section 139 of the NI Act only creates a presumption that the cheque has been drawn by the payee or holder in due course but it does not create any presumption that the cheque is backed by existing legal debt/liability. It is the duty of the prosecution to prove by way of cogent evidence that the cheque is backed by existing legal debt/liability. The onus of proof of liability is always with the Opposite Party no.2. Furthermore, the Learned Appellate Court has failed to consider that mere presumption is not substitute of proof and passed the impugned Judgment and Order wrongly and illegally.
9. It is further stated that several relevant witnesses have not been examined by the complainant thus causing prejudice to the petitioner/accused.

10. The case of the complainant in his petition of complaint is that:-

He has been engaged in construction enterprise and considering his credibility and goodwill the local U.B.I. Raghunathpur Branch has provided him with a trade loan account bearing A/C No. 9.

On 28.02.2006 the complainant along with witness Nos. 2 and 3 had been to U.B.I. Raghunathpur Branch and there the accused/petitioner met him and informed that he is in dire need of Rs. 7,00,000/- (Seven Lacs) only for a couple of months for incidental expenses relating to his contemplated project. Complainant innocently believed such proposal of the accused and issued cheque no.951764 on his trade loan A/C for Rs.7,00,000/- in favour of the accused on 28.02.06.

The accused withdrew the sum of Rs. 7,00,000/- and shortly thereafter accused approached the complainant for another sum of Rs. 1,45,000/- (one lac forty five thousand) in presence of witness Nos. 2 and 3. Complainant was hesitant to accede to such request of the accused by the latter repeatedly insisted with the complainant to arrange the sum and promised to repay the entire sum very shortly.

The complainant accordingly gave Rs. 1,45,000/- to the accused in presence of witness nos. 2 and 3 in the early part of March, 2006.

The accused thereafter started avoiding the complainant. However on 28.04.2006 the accused in discharge of his existing debts and liabilities had given the complainant at Raghunathpur a cheque bearing No. 997309 for Rs. 8,45,000/- (eight lac forty five thousand) drawn on his A/c maintained with Chartered Bank, N.S. Road Kolkata. However the accused while handing over the said cheque requested the complainant not to present the same for encashment before third week of July, 2006.

The complainant as per instruction of the accused presented the cheque No. 997309 dated 28.04.2006 for encashment on 22.07.2006 through his Banker U.B.I. Raghunathpur Branch. The said cheque was dishonoured and the complainant received back the cheque along with memo. of Standard Chartered Bank dated 27.07.2006 through his Banker on 03.08.2006 with the endorsement "Insufficient funds".

The complainant then through his Lawyer Sri Arun Kumar Moni of Raghunathpur Court issued a demand notice to the accused dated 14.08.2006. It was sent under registered Post with A/D on 16.08.2006 and it was duly received on

behalf of the accused on 19.08.2006 as per the endorsement appearing on the A/D card.

11. The petitioner/accused in spite of receipt of the demand notice failed to pay Rs. 8,45,000/- to the Complainant, within the statutory period.
12. Hence the case was registered for offence punishable under Section 138 N.I. Act.
13. The accused was examined under Section 251 Cr.P.C.
14. The original cheque was proved and marked Exhibit - 3.
15. The cheque return memo was marked Ext. 3/1.
16. The legal notice and its receipt has been marked Exhibit 3/4 and 3/3 respectively.
17. The accused/petitioner proved documents relating to his hospital (Exhibit A & B).
18. **The petitioner on filing a written notes of argument has submitted that:-**
 - (i) The cheque from the account of Shilabati Hospital Pvt. Ltd. under the official seal of the company by its director was issued.
 - (ii) Notice was issued against the petitioner alone and no notice to the company.
 - (iii) Complaint was filed against the petitioner alone and the company has not been arraigned as accused.
19. It is further submitted that the Learned Courts ignored that the impugned proceeding is not maintainable in the teeth of legal bar of

not implicating the drawer of the cheque as accused, in view of settled propositions of law.

20. It is also submitted that the Learned Magistrate has proceeded with the instant case in terms of Section 143 of Negotiable Instruments Act, 1881, i.e. Summary Trial. In terms of Section 326(3) of Code of Criminal Procedure, 1973, which is a mandatory provision, no conviction can be recorded by the Learned Magistrate on the evidences partly recorded by his predecessor and partly by him.

21. It is further stated that:-

- a) The Company Shilabati Hospital Pvt. Ltd. has not been arraigned as accused in this case.
- b) The Cheque has been issued from the account maintained by the Company and under the seal of the Company.
- c) No notice under Section 138(b) of Negotiable Instruments Act, 1881 has been issued against the Company.
- d) The Petitioner i.e. sole accused has been implicated as director of the said company by invoking the principal of vicarious liability, for commission of an alleged offence which is allegedly committed by the Company.

22. The following Judgments have been relied upon by the petitioner:-

- (i) ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661. Para – 17, 56 to 60.***

- (ii) *Himanshu Vs. B. Shivamurthy and Anr. (2019) 3SCC 797, (Para 6, 12, 13, 14).*
- (iii) *Charanjit Pal Jindal Vs. L.N. Metalics (2015) 15 SCC 768 (Para 2, 4, 11 and 12).*
- (iv) *Mr. Raj Sahai Vs. The State of West Bengal & Anr. (CRR No. 100 of 2020). Para 28 to 30.*
- (v) *Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi (2015) 9 SCC 622. Para – 2, 5, 8 to 11, 13.*

23. The Opposite Party no. 2/Complainant has also submitted a written notes of argument stating therein that **it will be clear that the Petitioner had sought for monetary assistance in his personal capacity and not as a Director of Shilabati Nursing Home Pvt. Ltd. and as such there was no requirement for the Opposite Party No. 2 to implicate the said company Shilabati Nursing Home Pvt. Ltd. as an accused in this instant case.** It is further stated that the law laid down by the Hon'ble Apex Court in Mainuddin Abdul Sattar Shaikh (Supra) squarely applies in the instant case and as such the contention raised by the Petitioner is liable to be dismissed.

24. The Judgments relied upon by the Opposite Party no. 2 are:-

- (i) *J.V. Baharuni and Anr. vs State of Gujarat and Anr., (2014) 10 SCC 494.*
- (ii) *Mainuddin Abdul Sattar Shaikh vs Vijay D. Salvi, (2015) 9 SCC 622.*

- 25. On perusal of Exhibit 3, the Original Cheque in question, it is clear that cheque was issued by the petitioner as a director of the company, Shilabati Hospital Pvt. Ltd. and not in his personal capacity.**
- 26.** But the notice under Section 138 N.I. Act (Exhibit 3/4) has been issued only to the petitioner.
- 27. The Company is neither a party nor was any notice served upon the Company of which the petitioner as director issued the cheque.**
- 28.** The petitioner is the sole accused/opposite party in the complaint case, having signed the cheque as Director of the company, for and on its behalf.
- 29.** The Supreme Court in ***Himanshu vs. B. Shivamurthy & Anr.*** (***Supra***) held:-

“11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. **The complaint was lodged only against the appellant without arraigning the company as an accused.**

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

30. The facts in the present case is very similar to the case, in ***Himanshu vs. B. Shivamurthy & Anr. (Supra).***

31. In the present case:-

- a) The company has not been made an accused nor was any notice served upon the company, though the cheque was issued on behalf of the company.
- b) The petitioner has been made an accused as the person, who signed and issued the cheque.

32. Therefore, in the absence of the company being arraigned as an accused, a complaint against the petitioner is not maintainable ***Himanshu vs. B. Shivamurthy & Anr. (Supra).***

33. The contention of the petitioner in respect of the cheque being issued not in discharge or debt or liability has been stressed upon.

34. In a proceeding under Section 138 N.I. Act, presumption is in favour of the Holder of the cheque and that such cheque had been issued in discharge of legal debt and/or liability, unless proved otherwise/rebutted by the accused.

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

“13. Section 139 of the NI Act states:

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

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

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

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

[...]

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

(emphasis supplied)

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

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

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

12. Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability.

The expression “unless the contrary is proved” indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a “reverse onus clause” the three-Judge Bench this Court in Rangappa held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:

*“28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, **it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of “preponderance of probabilities”.** Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise*

such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.”

(emphasis supplied)

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

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

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

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

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise

a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

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

13. *It can thus be seen that this Court has held that once the execution of cheque is admitted, Section 139 of the N.I. Act mandates a presumption that the cheque was for the discharge of any debt or other liability. It has however been held that the presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. It has further been held that to rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. It has been held that inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.”*

37. In the present case the presumption is clearly in favour of the complainant and the petitioner has not been able to rebut the said presumption under Section 139 N.I. Act. **But there is no compliance under Section 141 N.I. Act and as such the proceedings in the present case is clearly not maintainable.**

38. In *Himanshu vs B. Shivamurthy & Anr., AIR 2019 SC 3052*, **decided o on 17 January, 2019**, the Supreme Court held:-

“..... In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a

Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.....”

39. CRR 887 of 2019 is thus allowed.

40. The Judgment and Order dated February 22, 2019 passed by the Court of the Learned Additional Sessions Judge, Raghunathpur at Purulia, in connection with Criminal Appeal No. 03 of 2017 thereby affirming the Judgment and Order dated July 19, 2017 passed by the Learned Magistrate, 1st Court, Raghunathpur, Purulia in C. Case No. 39 of 2006 under Section 138 of the Negotiable Instruments Act, 1881 thereby convicting the petitioner under Section 255(2) of the Code of Criminal Procedure, 1973 for Commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and sentencing the petitioner to suffer simple imprisonment for one year and to pay compensation of Rs. 10 lakhs to the Opposite Party no.2 within two months from the date of the Order, in default, to suffer rigorous imprisonment of further two months, **is hereby set aside/quashed.**

41. All connected applications, if any, stand disposed of.

42. Interim order, if any, stands vacated.

43. Copy of this judgment be sent to the learned Trial and Appellate Courts for necessary compliance.

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

(Shampa Dutt (Paul), J.)