

IN THE HIGH COURT AT CALCUTTA
(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 403 of 2018

Sri Raju Saha

Vs

The State of West Bengal & Anr.

For the Appellant : Mr. Manik Lal Poddar.

For the State : None.

For the Respondent No. 2 : None.

Hearing concluded on : 26.04.2024

Judgment on : 21.05.2024

Shampa Dutt (Paul), J.:

The Appeal:-

1. The present appeal has been preferred against a judgment and order dated May 15, 2018 passed by the Learned Metropolitan Magistrate, 5th Court, Calcutta in Case No. C- 11283 of 2014, TR No. 381 of 2014 under Section 138 of the Negotiable Instruments Act.

The Prosecution:-

2. Due to financial scarcity, the petitioner gave interest free accommodation loan to the respondent No.2 and the respondent No.2 issued four cheques to discharge his liability against the said accommodation loan. The Respondent No.2 issued cheque No. 756742 dated February 10, 2014 of Rs. 2,00,000/-; Cheque No. 042350 dated February 10, 2014 of Rs 1,00,000/-; Cheque No. 756750 dated February 12, 2014 of Rs. 1,00,000/- and Cheque No. 756754 dated February 12, 2014 of Rs. 90,000/- total amounting to Rs. 4,90,000/-. All Cheques were drawn on ICICI Bank Ltd., R.N. Mukherjee Road Branch, Kolkata, in favour of the petitioner and the petitioner deposited the Cheques with Indian Overseas Bank, Strand Road Branch, Kolkata for encashment but the Cheques were returned with the remark 'Fund Insufficient' as per Bank Memo dated February 15, 2014. The petitioner sent a demand notice dated February 25, 2014 and the said notice was served upon the respondent on February 26, 2014 but the respondent No. 2 failed and neglected to make the

payment. Accordingly, the Respondent No.2 committed an offence punishable under Section 138 of the Negotiable Instruments Act.

3. The petitioner submits that the Learned Magistrate passed an order of acquittal, on the ground that **the debt is not legally enforceable against the accused person because the complainant did not produce any document to show that the said amount of loan was shown in the Income Tax file.**
4. The petitioner submits that the Learned trial Court passed the order of acquittal on the ground that **the complaint did not produce any document to show that he has money lending authority.**
5. The petitioner submits that the respondent No.2 issued the cheques in question to discharge his enforceable liability which was dishonored. Thereafter, the petitioner issued demand notice, which was received by the respondent No.2 but he failed to make the payment thereof. Thus, the respondent No.2 failed to rebut the presumption under Section 139 of the Negotiable Instruments Act.
6. On completion of trial, the Respondent/accused was acquitted by the trial Court.

The Evidence:-

7. The complainant has examined himself as P.W.1 and duly proved Exhibit 1 series, the cheques (4) in this case.
8. Exhibit 2 is the cheques return memo showing that all the cheques were dishonored for “insufficient funds”.

9. Exhibit 3 is the deposit slip.
10. Exhibit 4, Demand Notice.
11. Exhibit 5 is the postal receipt.
12. Exhibit 6 is the Acknowledgement and Track Report showing due service of notice.
13. Exhibit 7 series are documents supporting the Complainant/Appellant's case that, he had given loan of the amount as stated in this case to the Respondent/Accused and in discharge of his said liability, the cheques were issued by the Respondents, which on presentation were dishonoured and in spite of valid demand notice being served, the amount of the cheques was not repaid to the Appellant herein.

Analysis of Evidence:-

14. The Respondent/Accused's wife deposed as Defence Witness 1, she has admitted the loan taken by her husband, but has deposed that the said loan was repaid. **No documents has been placed and proved in support of such alleged repayment.**

Conclusion:-

15. The relevant findings of the trial Court dismissing the case of the Appellant/Complainant and acquitting the Respondent/Accused are as follows:-

..... At this juncture, the Court is to see whether the debt of the instant case is legally enforceable against the accused person or not.

The materials on record reveals that the complainant as PW-1 did not produce any document to show that the said amount of loan was shown in his Income Tax file. It is also appeared that the complainant as PW-1 did not produce any document to show that he has money lending authority.

In view of the above discussion, it is seen that the amount allegedly lent to the accused person by the complainant was unaccounted and not shown in the Income Tax return for the relevant year. Therefore, when the amount is not legally recoverable, it is difficult to hold that the cheques were issued towards legally enforceable debt invoking presumption U/s 139 N.I. Act. [Section 139 N.I. Act goes to say :- 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]. Complainant failed to establish that the amount allegedly lent to the accused is not unaccounted money and that he possessed license to lent money. If alleged loan has not shown in Income Tax Return, an adverse inference even could be drawn against the complainant.

For the aforesaid reason I find that the complainant has hopelessly failed to prove the case U/s 138 N.I. Act and the accused is liable to be acquitted.....

Sd/-

M.M. 5th Court, Calcutta.

- 16.** The Appellant/Complainant has filed written notes of Argument where in the following Judgments have been relied upon:-

i) The Hon'ble Supreme Court in Kumar -Versus- Sharma Carpets (2009) 2 SCC, on 20, December, 2022 hold:- [Page No. 14].

"This Court is of the considered opinion that mere non filing of Income Tax Return would not automatically dislodge the source of income of the

complainant. Nonpayment of Income Tax is a matter between the revenue and the assessee. If the assessee has not disclosed his income in the Income Tax Return, then the Income Tax Department is well within the rights to reopen the assessment of income of the assessee and to take action as per the provisions of Income Tax Act. However non filing of Income Tax Return by itself would not mean that the complainant had no source of income and thus, no adverse inference can be drawn in this regard only because of absence of Income Tax Return."

ii) Sri Devendra Dev – Versus – Shri Shiv Prakash Gupta,
on 17 July, 2023, [Page :13].

"Both the Acts are Independent Acts and operate in difference playing fields and have difference scope of operations and are not interdependent on each other. From the aforesaid, it is indisputable that the violation of Section 269SS of Income Tax Act, 1961 does not create any legal hindrance/bar to the proceedings under Section 138 of Negotiable Instrument Act, 1881.

It is controvertible that proceedings under Section 138 of Negotiable Instrument Act, 1881 cannot be dismissed or stalled for non-compliance/violation of Section 169 SS of the Income Tax Act. Such violation may give rise to penal proceedings under the Income Tax Act, but the prosecution of the accused for the alleged dishonor of cheque under Section 138 of Negotiable Instrument Act does not become bad in law on this score."

17. Section 139 of the Negotiable Instruments 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."

- 18.** 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.

- 19. 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.***

20. 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, 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 Another, 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."

21. In the present case, the Complainant has sent a demand Notice on the Cheque being dishonoured. And the presumption as per Section 139 N.I. Act is in favour of the Complainant. The accused did not rebut the presumption in any manner whatsoever.

Conclusion:-

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

23. 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.”

24. 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.”*

25. CRA 403 of 2018 is allowed.

26. The judgment and order dated May 15, 2018 passed by the Learned Metropolitan Magistrate, 5th Court, Calcutta in Case No. C- 11283 of 2014, TR No. 381 of 2014 under Section 138 of the Negotiable Instruments Act, **is hereby set aside, not being in accordance with law (Kumar -Versus- Sharma Carpets (Supra), Sri Devendra Dev –**

Versus – Shri Shiv Prakash Gupta (Supra), Bir Singh v. Mukesh Kumar (Supra) and Oriental Bank of Commerce vs Prabodh Kumar Tewari (Supra).

- 27.** The Respondent No. 2/accused, Raja Dutta is hereby convicted of the offence punishable under Section 138 of the Negotiable Instruments Act and is hereby directed to pay a fine of Rs. 8 lakhs within a period of two months from the date of this order in default to suffer imprisonment for six months and in default, the trial Court shall proceed in accordance with law.
- 28.** All connected applications, if any, stand disposed of.
- 29.** Interim order, if any, stands vacated.
- 30.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 31.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)