IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Revision No.452 of 2023
Reserved on : 03.12.2024
Date of Decision: 30.12.2024

Umed Ram

....Petitioner

Versus

Baldev Thakur

….Respondent

Coram
Hon'ble Mr. Justice Sushil Kukreja, Judge
Whether approved for reporting?[1] Yes.

For the petitioner : Mr. Vijay K. Arora, Senior Advocate with Mr. Gaurav Kumar Advocate.

For the respondent : Ms. Deepmala Sharma, Advocate.

Sushil Kukreja, Judge

The instant petition has been filed by the petitioner-accused/convict (hereinafter referred to as the accused) under Section 397 read with Section 401 of the Code of Criminal Procedure (Cr.P.C.) against judgment dated 19.01.2023, passed by the learned Sessions Judge, Shimla, H.P., whereby the judgment of conviction and order of sentence dated 01.10.2022, passed by the learned Judicial Magistrate, First Class, Court No.3, Shimla, HP, in

1 Whether reporters of Local Papers may be allowed to see the judgment?

case No.145-3 of 2017 were affirmed, with a prayer to quash and set aside the impugned judgments.

2. Brief facts of the case, as emerge from the record, are that on 02.01.2017 the accused borrowed a sum of Rs.2,00,000/- from the complainant due to friendly relations and assured him to return the same within a period of six months. However, the accused failed to return the borrowed money to the complainant, hence, in order to discharge his liability, he issued a cheque bearing No.520653 dated 07.07.2017, amounting to Rs.2,00,000/- drawn on HP State Cooperative Bank, Limited, Branch Sunni, District Shimla, in favour of the complainant. However, on presentation of the said cheque, it was returned unpaid to the complainant with the remarks “insufficient funds’, vide memo dated 11.07.2017. Thereafter, the complainant issued a legal notice dated 29.07.2017 to the accused demanding the cheque amount, but the accused failed to pay the cheque amount within the stipulated period. Subsequently, the complainant filed a complaint u/s 138 of

Negotiable Instruments Act on 05.09.2017 against the accused before the learned trial Court.

3. The learned trial Court, after having found sufficient material against the accused had, put notice of accusation to him vide order dated 06.12.2018 and on conclusion of trial, the learned trial Court convicted the accused for the commission of the offence under Section 138 of the NI Act and sentenced him to undergo simple imprisonment for one year and to pay compensation amount to the double of the cheque amount i.e. Rs.4,00,000/- and in default of payment of compensation, he had to undergo simple imprisonment for a further period of six months. Feeling aggrieved, the accused preferred an appeal before the learned Appellate Court, however, the learned Appellate Court, vide judgment dated 19.01.2023, dismissed the same and upheld the judgment/order of the learned trial Court.

4. The accused/petitioner, feeling dissatisfied with the impugned judgment of the learned Appellate Court, preferred the present revision petition.

5. Learned Senior Counsel for the petitioner contended that both the learned Courts below have not appreciated the law and evidence in its right perspective as the respondent had failed to prove that the cheque in question was actually given by the petitioner in order to discharge any legal liability. He further contended that the complainant had not filed his income tax return and had also failed to disclose his source of income, therefore, it cannot be said that the cheque in question was issued in discharge of any legal liability or enforceable debt.

6. On the other hand, learned counsel for the respondent supported the judgment of the learned trial Court and contended that since the charge against the accused has been duly proved beyond reasonable doubt, the learned trial Court has rightly convicted the accused on the basis of proper appreciation of evidence.

7. I have heard learned Senior Counsel for the petitioner as well as learned counsel for the respondent and also gone through the record carefully.

8. Before adverting to the merits of the case, it would be apposite to have a look into the legal position. The scope of revision is very limited and unless the revision petitioner can show that the judgments of the courts below were perverse or grossly erroneous, this Court would not ordinarily interfere with their decisions.

9. In ***State of Kerala*** vs. ***Puttumana Illath Jathavedan Namboodiri, (*1999)2 SCC 452** The Hon'ble Apex Court observed as under:-

> ***"5. In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of jusitce. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence as already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***

10. The Hon'ble Apex ***Court in Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke and Others (2015)3 SCC123*** (6 supra) also held that:-

> ***"14……..Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non- consideration of any relevant material or there is palpable misreading of records, the revisional court is not justified in setting aside the order, merely because another view is possible.***

> ***The revisional court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. Revisional power of the court under Sections 397 to 401 of Cr.P.C. is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."***

11. It is a settled proposition of law that presumption under Section 139 of NI Act is a presumption of law, as distinguished from a presumption of fact, such a presumption is a rebuttable presumption and the drawer of the cheque may dispel the same. The rebuttal does not have to be conclusively established, but such evidence must be adduced in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable; the standard of reasonability being that of a 'prudent man'. The aforesaid position in law stands settled in the judgment of the Hon'ble Supreme Court in the matter of ***Hiten P. Dalal*** Vs. ***Bratindranath Banerjee, (2001) 6 SCC 16***. While dealing with the aspect of presumption in terms of Section 139 of NI Act, the Hon'ble Supreme Court observed as under:-

"21. The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "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". The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A. Vaidyanatha Iyer AIR 1958 SC 61, 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. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces 7 of 36 evidence showing the reasonable possibility of the non- existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.

24. Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay AIR 1961 SC 1316,

> ***this Court held that the presumption of law under Section 118of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantrai Balwantrai Desai vs State of Maharashtra AIR 1964 SC 575, where this Court reiterated the principle enunciated in State of Madras vs Vaidyanath Iyer (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory 8 of 36 presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."***

12. In the matter of ***Kumar Exports*** Vs. ***Sharma Carpets, (2009) 2 SCC 513***, it has been held by the Hon'ble Supreme Court that Section 118 of the NI Act *inter-alia* directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. The relevant portion of the aforesaid judgment is reproduced as under:-

> ***"13. In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain presumptions to be raised. This Section lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument passes from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade. Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance,(iv) as to time of transfer, (v) as to order of indorsements,(vi) as to appropriate stamp and (vii) as to holder being a holder in due course.***
>
> ***14. Section 139 of the Act provides that 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.***
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> ***19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."***

13. In the instant case, in support of his case, the complainant while appearing in the witness box as CW-1 re-asserted and reiterated the averments made in the complaint under Section 138 of NI Act. He also placed on record cheque Ext. CW1/A, return memo Ext. CW1/B, legal notice Ext.CW1/C and postal receipt Ext.CW1/D.

14. From the perusal of the evidence of the complainant, it has become clear that the cheque Ext.CW1/A was dishonoured on account of “insufficient funds” in the bank account of the accused, vide memo, Ext. CW1/B. In light of the evidence on record, the complainant has discharged his initial burden and, therefore, it is required to be presumed that the cheque in question was drawn for consideration and the complainant received the same in discharge of the existing debt. The onus, therefore, shifts upon the accused to establish probable defence so as to rebut such presumption.

15. The law is well settled that in order to rebut the statutory presumption, the accused is not expected to prove his defence beyond reasonable doubt as is expected of the prosecution in a criminal trial. The accused may adduce direct evidence to prove that the cheque in question was not supported by consideration and that there was no debt or liability to be discharged by him. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead

this 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. It is settled position of law 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 the rebuttal as envisaged under Sections 118 and 139 of the N.I. Act. Reference can also be made to the judgment of the Hon'ble Supreme Court in ***Rangappa*** vs. ***Sri Mohan (2010) 11 SCC 441***, wherein it has been observed 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. The relevant paras of the aforesaid judgment are reproduced 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 (supra) 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 14 of 36 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 accused/defendant cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.' In the present case on hand, the accused merely denied the case of complainant and he has not placed sufficient materials before the court to believe his defence. Mere denial of the case of complainant is not sufficient ground to believe the defence of accused that the complainant has not lent an amount of Rs.30 lakhs to the accused."

16. In ***Rohitbhai Jivanlal Patel Vs. State of Gujarat and another, (2019) 18 SCC 106,*** it has been held by the Hon'ble Supreme Court that once the accused could not deny his signatures on the cheque in question that had been drawn in favour of the complainant, therefore, it is required to

be presumed that the cheque in question was drawn for consideration and the holder of the cheque i.e. the complainant received the same in discharge of an existing debt. Para-15 of the aforesaid judgment is reproduced 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 fact 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. The Hon'ble Supreme Court of India in ***Triyambak S Hegde Vs Sripad, (2022) 1 SCC 742,*** while relying upon the the constitution bench judgment of ***Basalingappa v Mudibasappa, (2019) 5 SCC 418,*** under para 14 of its judgment reiterated that once the cheque was issued and that the signatures are upon the cheque are accepted by the accused, the presumptions under section

118(a) and section 139 of the NI Act arise against the accused. That is, unless the contrary is proved, it shall be presumed that the cheques in question were drawn by the accused for a consideration and that the complainant had received the cheque in question in discharge of debt/liability from the accused. Relevant portion of the aforesaid judgment reads as under:-

> ***"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.***
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> ***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.***
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> ***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."***

18. In his statement recorded under Section 313, Cr.P.C., the accused had not disputed his signatures on the cheque in question. Therefore, it is required to be presumed that the cheque in question was drawn for a consideration and the holder of the cheque, i.e. the complainant received

the same in discharge of an existing debt. Now, the onus shifts upon the accused to establish a probable defence so as to rebut such a presumption. In his defence, the accused himself stepped into the witness box as DW-1 and deposed that in the year 2009, he obtained loan of Rs.30,000/- from the complainant and in lieu thereof,the complainant had obtained a signed cheque book from him. He further deposed that he repaid the aforesaid amount and thereafter when he demanded the cheque book, the complainant had not returned the same on one pretext or the other. He further deposed that he had never received a sum of Rs.2,00,000/- from the complainant and had also not issued any cheque in lieu thereof and the complainant had misused his cheque. However, except for the self-serving testimony of the accused, no evidence has been led by the accused to rebut the presumption that the cheque was not issued in discharge of any debt or any other liability. Therefore, in the absence of any cogent and satisfactory evidence on record on the part of the accused, it is presumed that the cheque in question

had been drawn for consideration and the complainant received the same in discharge of an existing debt.

19. The learned Senior Counsel for the accused lastly contended that the complainant had not filed his Income Tax Return and had also failed to disclose his source of income, therefore, it cannot be said that the cheque in question was issued in discharge of any legal liability or enforceable debt. However, this contention of the learned Senior counsel for the petitioner, about the complainant failing to file Income Tax Return or questioning the source of funds of the complainant for advancing loan to the accused is devoid of any merits. Mere non filing of Income Tax return by itself would not mean that the complainant had no source of income.

20. The Hon'ble Supreme Court in a catena of judgments had held that the complainant need not prove his financial capacity in the matter until and unless the same has been contended by the accused in his reply to the legal demand notice as only then the complainant would know that the same is being questioned, however, the accused has the

freedom to question the financial capacity of the complainant during the trial by either producing relevant evidence i.e. by documents or by cross examining the complainant. The Hon'ble Apex Court held in ***Tedhi Singh v. Narayan Dass Mahant, (2022)6 SCC 735*** that:-

> ***"10. The Trial Court and the First Appellate Court have noted that in the case under Section 138 of the N. I. Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the N. I. Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent the Courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross examination of the witnesses of the complainant. Ultimately, it becomes the duty of the Courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence".***

21. In the case on hand, admittedly, reply to the legal demand notice was never forwarded on behalf of the accused/petitioner. Moreover, the accused has also failed to demonstrate during the trial by examining any independent witness and by producing the relevant documents that the

complainant did not have the financial capacity for advancing loan to the accused. Thus the claim of the accused regarding financial capacity of the complainant does not stand as non filing 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 its rights to re-open the assessment of income of the assessee and to take action as per the provisions of Income Tax Act. This court cannot jump to the conclusion that presumption under Section 139 of NI Act stands rebutted, merely because of non filing of the Income Tax Return by the complainant unless, the petitioner makes out a probable defence, as to how the cheque had gone in the hands of the complainant. Thus, even though, the complainant has not filed his Income Tax Return, the same cannot be a ground to reject his claim to prosecute the accused under Section 138 of NI Act.

22. On overall appraisal of the material available on record, it is the considered opinion of this Court that the accused had failed to discharge his burden to rebut the

statutory presumption. From the perusal of the material available on record, the complainant has proved the guilt of the accused that he is liable to pay the amount covered under the cheque. There is no substance in the probable defence of the accused, whereas the complainant has discharged his burden and proved the guilt of the accused. The accused has failed to rebut the statutory presumption drawn against him under Section 138 of NI Act. All the basic ingredients of Section 138 as well as Sections 118 and 139 of NI Act are apparent in the facts and circumstances of the present case. There is sufficient evidence to come to the conclusion that the cheque Ext.CW1/A was issued by the accused and received by the complainant in discharge of an existing debt as such the accused has committed an offence punishable under Section 138 of NI Act.

23. Consequently, the present revision petition is dismissed being devoid of any merit and the petitioner-accused is directed to surrender before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court, if not already served. Bail bonds of the

petitioner are cancelled and discharged. Interim direction, if any, stands vacated.

Pending application(s), if any, also stand disposed of.

(Sushil Kukreja)
Judge

30th December, 2024
(vh/virender)