IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Revision No. 655 of 2024

Abdul Qadir ....Revisionist

Vs.

State of Uttarakhand and Another ..... Respondents

Mr. Sudhir Kumar, Advocate for the revisionist.
Mr. Vipul Painuly, Brief Holder for the State of Uttarakhand.

JUDGMENT

Hon'ble Ravindra Maithani, J. (Oral)

The instant revision is preferred against the following"-

(A) The judgment and order dated 02.08.2023, passed in Criminal Case No.4465 of 2021, Manish Kumar Gupta Vs. Abdul Qadir and Another, by the court of Second Additional Civil Judge/Judicial Magistrate, Nainital ("the case"). By it, the revisionist has been convicted under Section 138 of the Negotiable Instruments Act, 1881 ("the Act") and sentenced to one year Simple Imprisonment along with a fine of Rs. 3,00,000/-. And;

(B) The judgment and order dated 06.08.2024, passed in Criminal Appeal No.81 of 2023,, Abdul Qadir Vs. State and

Another, by the court of Second Additional Sessions Judge, Haldwani, District Nainital. By it, the judgment and order dated 02.08.2023, passed in the case, has been affirmed.

2. At the time of admission of the revision, the original record has been summoned.

3. Heard learned counsel for the parties and perused the record.

4. The case is based on a complaint filed by the private respondent under Section 138 of the Act. According to it, the revisionist had taken Rs. 2,50,000/- as loan, from the private respondent in the month of October, 2019, for his family needs. In return thereof, the revisionist gave a cheque dated 20.07.2021 of Rs. 2,50,000/- to the private respondent, with the assurance that when presented, the private respondent shall get payment of it. The cheque was presented in the bank, but it was dishonoured. A notice was given to the revisionist. The revisionist refused to receive the notice. Thereafter, the complaint was filed. After enquiry, by the order dated 16.10.2021, passed in the case, the revisionist was summoned to answer accusation under Section 138 of the Act. In evidence, the private

respondent was examined as PW1. In fact, prior to it, the accusation was read over to the revisionist. According to the revisionist, he did not issue any cheque in discharge of any of his obligations. Instead, one of his worker, Mohd. Nazim had taken Rs.50,000/- loan from the private respondent, and as a security to it, the cheque was given by the revisionist to the private respondent just after signing.

5. In his examination under Section 313 of the Code of Criminal Procedure, 1973, the revisionist has reiterated the same statement. The revisionist also examined himself as DW1 and one more witness, DW2, Mohd. Nazim, was examined in the defence. After hearing the parties, by the judgment and order dated 02.08.2023, passed in the case, the revisionist has been convicted and sentenced, as stated hereinabove. This judgment and order has unsuccessfully been challenged in appeal.

6. Learned counsel for the revisionist would submit that the prosecution has utterly failed to prove its case beyond reasonable doubt. The judgments and orders are bad in the eyes of law. He raised the following points in his submission:-

(i) The private respondent has not specified any date, when the loan was advanced; the rate of interest was also not disclosed.

(ii) The stand of the revisionist is quite clear throughout that he did not take any loan from the private respondent. Instead, one of his workers, Mohd. Nazim, had loan from the private respondent, and in security thereof, blank cheques were given by the revisionist.

(iii) The need, as stated, for taking loan, is false. According to the private respondent, the revisionist had taken loan for the purpose of study of his son, but the son of the revisionist had already passed B.Tech examination prior to taking of loan.

(iv) The presumption under Section 139 of the Act is rebuttable and the rebuttal may not be beyond reasonable doubt. It should be at the level of probable defence.

(v) The private respondent is an income tax payee. No documents with regard to income tax return of the revisionist have been filed to show that the loan has been given to him.

(vi) Terms of loan have also not been specified or given by the private respondent. As per the provision of the Income Tax Act, 1961, the transaction of more than Rs. 20,000/- should be done by Negotiable Instruments; it has not been done in the instant case.

(vii) The capacity of the private respondent to advance loan is not disputed, but, it was required to be proved by the private respondent that he has cash in hand so as to advance Rs. 2,50,000/-, as loan.

7. In support of his contention, learned counsel for the revisionist has placed reliance on the principles of law, as laid down in the cases of M.S. Narayan Menon @ Mani Vs. State of Kerala and Another, (2006) 6 SCC 39, John K. John Vs. Tom Varghese and Another, (2007) 12 SCC 714, Krishna Janardan Bhat Vs. Dattatraya G. Hegde, (2008) 4 SCC 54, Rangappa Vs. Sri Mohan (2010) 11 SCC 441, Vijay Vs. Laxman and Another, (2013) 3 SCC 86, Indus Airways Private Limited Vs. Magnum Aviation Private Limited (2014) 12 SCC 539, K. Subramani Vs. K. Damodara Naidu, (2015) 1 SCC 99, Basalingappa Vs. Mudibasappa, (2019) 5 SCC 418, Rajaram through LRs. Vs. Maruthachalam through LRs, 2023 SCC OnLine SC 48, Dattatraya Vs.

Sharanappa, (2024) 8 SCC 573, and Tedhi Singh Vs. Narayan Dass Mahant, (2022) 6 SCC 735.

8. In the case of Narayan Menon (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

9. In the case of John K. John (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "11. .....
> .....
> .....
> .....The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the Court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only had no document been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent was not even in a position to discharge his burden to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken."

10. In the case of Krishna Janardan Bhat (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "25. He did not produce any books of accounts or any other proof to show that he got so much money from the Bank. He admittedly did not have any written document pertaining to the accused. He accepted that there was no witness to the transaction. He, of course, denied certain suggestions, but the suggestions put to him were required to be considered by the court below in the backdrop of the facts and circumstances of the case."
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> "26. The courts below failed to notice that ordinarily in terms of Section 269-SS of the Income Tax Act, any advance taken by way of any loan of more than Rs 20,000 was to be made by way of an account payee cheque only."
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> "27. Section 271-D of the Income Tax Act reads as under:
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> "271-D. Penalty for failure to comply with the provisions of Section 269-SS.—
>
> (1) If a person takes or accepts any loan or deposit in contravention of the provisions of Section 269-SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted."
>
> (2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner."
>
> "35. A statutory presumption has an evidentiary value. The question as to whether the presumption stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration."

11. In the case of Rangappa (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "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, 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."

12. In the case of Vijay (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

"11. While dealing with the aforesaid two presumptions, the learned Judges of this Court in P. Venugopal v. Madan P. Sarathi, (2009) 1 SCC 492, had been pleased to hold that under Sections 139, 118(a) and 138 of the NI Act existence of debt or other liabilities has to be proved in the first instance by the complainant but thereafter the burden of proving to the contrary shifts on the accused. Thus, the plea that the instrument/cheque had been obtained from its lawful owner or from any person in lawful custody thereof by means of an offence or fraud or had been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of disproving that the holder is a holder in due course lies upon him. Hence, this Court observed therein, that indisputably, the initial burden was on the complainant but the presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. Thereafter, the presumption raised does not extend to the extent that the cheque was not issued for the discharge of any debt or liability which is not required to be proved by the complainant as this is essentially a question of fact and it is the defence which has to prove that the cheque was not issued towards discharge of a lawful debt."

"27. Coming then to the present case, the absence of any details of the date on which the loan was advanced as also the absence of any documentary or other evidence to show that any such loan

> transaction had indeed taken place between the parties is a significant circumstance."

13. In the case of Indus Airways Private Limited (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "15. .....
> .....
> ..... The Delhi High Court has travelled beyond the scope of Section 138 of the NI Act by holding that the purpose of enacting Section 138 of the NI Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability."

14. In the case of K. Subramani (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "9. In the present case the complainant and the accused were working as Lecturers in a government college at the relevant time and the alleged loan of Rs 14 lakhs is claimed to have been paid by cash and it is disputed. Both of them were governed by the Government Servants' Conduct Rules which prescribes the mode of lending and borrowing. There is nothing on record to show that the prescribed mode was followed. The source claimed by the complainant is savings from his salary and an amount of Rs 5 lakhs derived by him from sale of Site No. 45 belonging to him. Neither in the complaint nor in the chief-examination of the complainant, is there any averment with regard to the sale price of Site No. 45. The sale deed concerned was also not

produced. Though the complainant was an income tax assessee he had admitted in his evidence that he had not shown the sale of Site No. 45 in his income tax return. On the contrary the complainant has admitted in his evidence that in the year 1997 he had obtained a loan of Rs 1,49,205 from LIC. It is pertinent to note that the alleged loan of Rs 14 lakhs is claimed to have been disbursed in the year 1997 to the accused. Further the complainant did not produce bank statement to substantiate his claim. The trial court took into account the testimony of the wife of the complainant in another criminal case arising under Section 138 of the NI Act in which she has stated that the present appellant-accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial court came to the conclusion that the complainant had no source of income to lend a sum of Rs 14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him."

15. In the case of Basalingappa (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

"12. The complainant being holder of cheque and the signature on the cheque having not been denied by the accused, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before we refer to judgments of this Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn.....
....."

"16. This Court in M.S. Narayana Menon case [M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39, held that what is needed is to raise a probable defence, for which it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and even the evidence adduced on behalf of the complainant can be relied upon.....
....."

16. In the case of Rajaram (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "29. In the present case, the accused appellant had examined Mr. Sarsaiyyn, Income Tax Officer, Ward No. 18, Circle (II)(5), who produced certified copies of the Income Tax Returns of the complainant for the financial year 1995-1996, 1996-1997, 1997-1998 and 1998-1999. The certified copies of the Income Tax Returns established that the complainant had not declared that he had lent Rs. 3 lakh to the accused. It further established that the agricultural income also was not declared in the Income Tax Returns."
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> "30. The learned Trial Court further found that from the income which was shown in the Income Tax Return, which was duly exhibited, it was clear that the complainant(s) did not have financial capacity to lend money as alleged."
>
> "34. After analyzing all these pieces of evidence, the learned Trial Court found that the Income Tax Returns of the complainant did not disclose that he lent amount to the accused, and that the declared income was not sufficient to give loan of Rs. 3 lakh. ...."

17. In the case of Dattatraya (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "28. Furthermore, on the aspect of adducing evidence for rebuttal of the aforesaid statutory presumption, it is pertinent to cumulatively read the decisions of this Court in Rangappa v. Sri Mohan, (2010) 11 SCC 441, and Rajesh Jain v. Ajay Singh, (2023) 10 SCC 148, which would go on to clarify that the accused can undoubtedly place reliance on the materials adduced by the complainant, which would include not only the complainant's version in the original complaint, but also the case in the legal or demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his Section 313CrPC, 1973 statement or at the trial as to the circumstances under which the promissory note or cheque was executed. The accused ought not to adduce any further or new evidence from

> his end in the said circumstances to rebut the statutory presumption concerned."

18. In the case of Tedhi Singh (*supra*), the Hon'ble Supreme Court, *inter alia*, observed as follows:-

> "15. However, we would think that in the totality of facts of this case the appellant has not established a case for interference with the finding of the courts below that the offence under Section 138 of the NI Act stands committed by the appellant. We have been told that the amount of compensation in a sum of Rs 7 lakhs which is relatable to the cheque amount has been deposited already in the trial court. However, we would think that the appellant should be granted relief in the form of substitution of the sentence of imprisonment of one year with a fine. An amount of Rs 5000 (five thousand) commends itself to us as an amount which should suffice as substitution for the imprisonment. Apart from that, we would also direct that a further amount of Rs 15,000 shall be paid as compensation to the respondent."

19. It is a revision. The scope of revision is quite restricted to the extent of examining the correctness, legality and propriety of any judgment and order. Generally, evidence are not reassessed in a revision unless inadmissible evidence is considered or admissible evidence is ignored or the finding is perverse, i.e. against the weight of evidence.

20. In the case of Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460, the Hon'ble Supreme Court observed as follows:-

> "12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself

as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits."

"13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

21. Before proceeding further, it would be apt to examine the presumptions that are available under the Act. Section 118 of the Act makes provisions with regard to the presumptions as to Negotiable Instruments, which reads as follows:-

"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;
> **(b) as to date:—**that every negotiable instrument bearing a date was made or drawn on such date;
> **(c) as to time of acceptance:—**that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;
> **(d) as to time of transfer:—**that every transfer of a negotiable instrument was made before its naturity;
> **(e) as to order of indorsements:—**that the indorsements appearing upon a negotiable instrument were made in the order in which they appear then on;
> **(f) as to stamp:—** that a lost promissory note, bill of exchange or cheque was duly stamped;
> **(g) that holder is a holder in due course:—** that the holder of a negotiable instrument is a holder in due course: provided that, where the instrutment has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

22. There is also a presumption that the holder of a cheque receives the cheque in whole or part of any debt or other liabilities. Section 139 of the Act reads 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 section138 for the discharge, in whole or in part, of any debt or other liability."

23. Undoubtedly, these presumptions are rebuttable and the law on this point is well settled that for rebutting the presumption, an accused is not required to lead any evidence. He can even, from the evidence of the complainant infer and make a case out that presumption has been rebutted. An accused is not required to rebut a presumption by the standard of a proof beyond reasonable doubt, but preponderance of probabilities or a probable defence is enough to rebut such presumptions. Each case is to be decided on the basis of the facts and circumstances of the particular case. There cannot be any straight jacket formulae to that extent.

24. In the case of Rohitbhai Jivanlal Patel Vs. State of Gujarat and Another, (2019) 18 SCC 106, the Hon'ble Supreme Court has discussed the presumption that are available under Sections 118 and 139 of the Act. The Hon'ble Supreme Court has also adverted to the level of evidence required to prove a case under the provisions of the Act. In Para 15, 18, 20 and 22, the Hon'ble Supreme Court observed as follows:-

> "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."

"18. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused. The aspect relevant for consideration had been as to whether the appellant-accused has brought on record such facts/material/circumstances which could be of a reasonably probable defence."

"20. .....
.....
.....
.....The observations of the trial court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the

> complainant and his witness, or that the witness of the complaint was more in the know of facts, etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. .....
> .....
> ....."
>
> "22. The result of discussion in the foregoing paragraphs is that the major considerations on which the trial court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the trial court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the trial court and after examining the evidence on record as a whole, found that the findings of the trial court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter."

25. In the case of Bir Singh Vs. Mukesh Kumar, (2019) 4 SCC 197, also, the Hon'ble Supreme Court discussed the issue with regard to the

presumptions; evidence and circumstances. In Paras 37 and 38, the Hon'ble Supreme Court observed as follows:-

> "37. The fact that the appellant complainant might have been an Income Tax practitioner conversant with knowledge of law does not make any difference to the law relating to the dishonour of a cheque. The fact that the loan may not have been advanced by a cheque or demand draft or a receipt might not have been obtained would make no difference. In this context, it would, perhaps, not be out of context to note that the fact that the respondent-accused should have given or signed blank cheque to the appellant complainant, as claimed by the respondent-accused, shows that initially there was mutual trust and faith between them."
>
> "38. In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant complainant, it may reasonably be presumed that the cheque was filled in by the appellant complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent-accused of the charge under Section 138 of the Negotiable Instruments Act."

26. In the case of Uttam Ram Vs. Devinder Singh Hudan and Another, (2019) 10 SCC 287, the Hon'ble Supreme Court observed that in a trial under the Act, the complainant is not required to prove his claim on the basis of evidence, as is required in a money

recovery suit. In Paras 20 and 21, the Hon'ble Supreme Court observed as follows:-

> "20. The trial court and the High Court proceeded as if, the appellant is to prove a debt before civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that the cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability."
>
> "21. There is the mandate of presumption of consideration in terms of the provisions of the Act. 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, …"

27. PW1, Maneesh Kumar Gupta, is the complainant. He has reiterated the averments of his complaint. According to him, the loan was advanced in

the year 2019 and in the year 2021, he was given the cheque in question by the revisionist, which, when presented, was dishonoured.

28. It has been the case of the revisionist that he was under no obligation to issue a cheque, but, one of his workers, Mohd. Nazim, had taken loan from the private respondent and as security thereof, he had given a cheque of Rs. 50,000/-.

29. The revisionist has been examined as DW1 and Mohd. Nazim has been examined as DW2. As DW1, Abdul Qadir, the revisionist, has stated that Mohd. Nazim had taken loan of Rs. 50,000/- at 5% rate of interest from the private respondent, and in lieu thereof, he had given two security cheques. According to DW1, Abdul Qadir, the revisionist, Mohd. Nazim, had returned the amount of loan, but he could not repay the interest. DW2, Mohd. Nazim, has also stated so.

30. As far as the rate of interest is concerned, the revisionist himself has stated that the loan was given at the rate of 5% interest. This has been so stated by DW2, Mohd. Nazim, in Para 3 of his statement, but in Para 10, he speaks of 10% rate of interest. It is true that no specific date has been disclosed by the private respondent. But then, it is not disputed that the cheque was given by the revisionist to the private respondent.

What is in dispute is as to why the cheque was given? According to the private respondent, loan was advanced to the revisionist and in repayment of the loan amount, cheque was given, whereas, as stated, according to the revisionist, loan was taken by Mohd. Nazim, an employee of him, and as a security, he had given the cheques.

31. There is no absolute principle that in each case, the income tax payee has to show the amount of loan in the income tax returns. It is true that the provisions of income tax requires that any transaction beyond Rs. 20,000/- should be by way of Negotiable Instruments. But if such transactions are made, they do not get invalidated for these reasons alone.

32. It is also settled position of law that in such cases, a person is not required to prove his case with regard to source of income or payment of money, as is required in the claim for money recovery. Signature on the cheques, in the instant case, has been admitted by the revisionist. DW2, Mohd. Nazim, has also stated that the private respondent would quite often visit his shop. He had taken loan once, but the revisionist was frequent in taking loan from the private respondent. The capacity of the private respondent is also not disputed. The trial court has extensively discussed the facts and recorded a

finding with regard to the presumptions, the loan amount and other liability of the revisionist.

33. In the impugned judgments and orders, all the aspects of the matter have been discussed. The findings are based on admissible evidence. It is not the case that any admissible evidence has been ignored. It cannot also be said that the finding is not based on legally admissible evidence. Therefore, the impugned judgments and orders are in accordance with law. They do not require any interference, so far as the conviction of the revisionist under Section 138 of the Act is concerned. To that extent, there is no merit in the revision and it deserves to be dismissed.

34. Learned counsel for the revisionist would also submit that the sentence is excessive. He would refer to the judgment in the case of Tedhi Singh (*supra*) to argue that the amount of fine may serve the purpose because the offence is regulatory in nature and the revisionist has been in jail for about two months. He would submit that Rs. 3,00,000/- fine and one year's imprisonment is excessive under the facts and circumstances of the case.

35. The dishonour of cheque and punishment is, in fact, a kind of regulatory offence. This aspect has been discussed by the Hon'ble Supreme Court in the

case of Somnath Sarkar Vs. Utpal Basu Mallick and Another, (2013) 16 SCC 465. The Hon'ble Supreme Court, in that case, observed that, **"We do not consider it necessary to examine or exhaustively enumerate situations in which courts may remain content with imposition of a fine without any sentence of imprisonment. There is considerable judicial authority for the proposition that the courts can reduce the period of imprisonment depending upon the nature of the transaction, the bona fides of the accused, the contumacy of his conduct, the period for which the prosecution goes on, the amount of the cheque involved, the social strata to which the parties belong, so on and so forth. Some of these factors may indeed make out a case where the court may impose only a sentence of fine upon the defaulting drawer of the cheque. There is for that purpose considerable discretion vested in the court concerned which can and ought to be exercised in appropriate cases for good and valid reasons. Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant. Inasmuch as the High Court did so, it committed no jurisdictional error...."**

36. Learned counsel for the revisionist would submit that the revisionist had surrendered to custody on 14.10.2024. It is a case based on loan transaction between the parties. Loan of Rs. 2,50,000/- was involved, as per the case. The total amount of Rs.3,00,000/-, as fine, has been imposed on the revisionist.

37. Having considered, this Court is of the view that the interest of justice would be better served, if the revisionist is sentenced to the period of custody, which he has already undergone in the instant case.

38. The conviction of the revisionist under Sections 138 of the Act, as recorded in the case and upheld in the appeal is confirmed.

39. The revisionist is sentenced to the period of custody, which he has already undergone in the instant case. The amount of fine and other directions with regard to payment of compensation given by the trial court and confirmed in appeal shall remain unaltered.

40. The impugned judgment and orders are modified to the extent, as narrated above.

41. The revision is partly allowed, accordingly.

42. The revisionist is in custody. He be released forthwith, if not wanted in any other case.

(Ravindra Maithani, J.)
12.12.2024

Ravi Bisht

RAVI BISHT
Digitally signed by RAVI BISHT
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