



2024:DHC:5611



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 31st July, 2024

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CRL.L.P. 221/2017

KRISHAN BIDHURI

..... Petitioner

Through: Mr. Ritesh Khatri, Advocate.

versus

KALYAN SINGH

..... Respondent

Through: Mr. Vipin Kumar Saini, Advocate.

CORAM:**HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.**

1. By this petition, Petitioner seeks leave to appeal against the impugned judgment dated 23.08.2016 passed by learned Metropolitan Magistrate-03 (NI-Act), South East, Saket, New Delhi, in complaint case being CC No. 871/2015 titled "*Krishan Bidhuri v. Kalyan Singh*" under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as 'NI Act'), whereby Respondent was acquitted. Petitioner herein was the complainant before the Trial Court and Respondent was the accused and parties are hereinafter referred to by their litigating status before this Court.

2. Factual matrix as per the Petitioner is that, in November, 2009, Respondent required a loan of Rs. 50 lacs from the Petitioner, but Petitioner refused to oblige. Later Respondent offered to sell his property bearing No. A-240, Madanpur Khadar, New Delhi, for Rs.25 lacs and demanded a sum



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of Rs.25 lacs as loan in addition. On 27.11.2009, Respondent sold his property for a consideration of Rs.25 lacs and executed documents in favour of the Petitioner and also handed over physical possession of the property.

3. Respondent obtained a loan of Rs.25 lacs on the same day and executed a promissory note and agreement in favour of the Petitioner and in discharge of the legal debt/liability also issued 7 post-dated cheques, with an assurance that the amount shall be repaid after 6 months and in case it was not paid, Petitioner shall be at liberty to deposit the cheques in his account.

Details of the cheques are as follows:-

- “(i) 005126 dated 30.6.2010 for Rs. 4,00,000/-
 - (ii) 005127 dated 04.7.2010 for Rs. 4,00,000/-
 - (iii) 005128 dated 10.07.2010 for Rs. 4,00,000/-
 - (iv) 005129 dated 14.07.2010 for Rs. 4,00,000/-
 - (v) 005130 dated 20.07.2010 for Rs. 4,00,000/-
 - (vi) 005131 dated 23.07.2010 for Rs. 4,00,000/-
 - (vii) 005132 dated 26.07.2010 for Rs. 1,00,000/-
- all drawn on Axis Bank Ltd., Greater Noida, UP”*

4. The cheques were, however, returned unpaid upon presentation vide the return memos dated 12.07.2010 and 06.08.2010 of the bank with remarks “*Funds Insufficient*”. Petitioner sent a legal notice to the Respondent on 09.08.2010 through registered AD post demanding payments of the amounts under the cheques within 15 days of the notice. Respondent failed to pay the amount within the stipulated time and Petitioner filed the present complaint. Respondent was granted bail and notice under Section 251 Cr.P.C. was framed, to which he pleaded ‘not guilty’ and claimed trial.



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5. Petitioner filed pre-summoning evidence by way of affidavit and reiterated the allegations in the complaint. Following documents were exhibited by the Petitioner:-

<i>"i Evidence by way of affidavit.</i>	<i>Ex.CW1/A</i>
<i>ii Promissory Note.</i>	<i>Ex.CW1/B</i>
<i>iii Agreement.</i>	<i>Ex.CW1/C</i>
<i>iv The deposit Slip.</i>	<i>Ex.CW1/D</i>
<i>v Cheque bearing no: 005126 dated 30.06.10.</i>	<i>Ex.CW1/E</i>
<i>vi Bank Returning memo dated 12.07.2010.</i>	<i>Ex.CW1/F</i>
<i>vii The deposit slips.</i>	<i>Ex.CW1/G</i> <i>(colly)</i>
<i>viii Cheques bearing no: 005127, 005128, 005129, 005130, 005131 & 005132.</i>	<i>Ex.CW1/H</i> <i>(colly)</i>
<i>ix Bank Returning Memo dated 06.08.2016.</i>	<i>Ex.CW1/I</i> <i>(colly)</i>
<i>x Copy of legal demand notice dated 09.08.2010.</i>	<i>Ex.CW1/J</i>
<i>xi Postal receipts, AD Card and UPC</i>	<i>Ex.CW1/K</i>
<i>xii AD Card</i>	<i>Ex.CW1/L</i>
<i>xiii UPC</i>	<i>Ex.CW1/M</i>
<i>xiv Complaint</i>	<i>Ex.CW1/N"</i>

6. Respondent was granted opportunity to cross-examine Petitioner's witnesses after which Petitioner's evidence was closed. Statement of the Respondent was recorded under Section 313 Cr.P.C. on 18.03.2014, wherein he admitted that the promissory note and the agreement bear his signatures and that he had issued the cheques in question but took a defence that Rs.25 lacs had already been repaid to the Petitioner and Petitioner had returned him photocopies of the cheques along with photocopy of the agreement, upon payment and Petitioner thereafter misused the cheques and filed the complaint.



7. Respondent being the accused led defence evidence and examined Sh. Rishabh Dhawan, Assistant Manager of Axis Bank, Greater Noida, Uttar Pradesh as DW-1 and stepped into the witness box himself as DW-2. Respondent produced the following documents:

"i. Certified Copy of plaint in suit no: 383/2010 titled as 'Kalyan Singh Vs Suman & Ors'" Ex.DW2/1

ii. Certified copies of written statement filed by complainant herein along with wife and children of accused in CS NO: 383/2010." Ex.DW2/2

8. After the evidence was concluded, learned MM heard arguments on 02.05.2016 and vide the impugned judgment dated 23.08.2016, acquitted the Respondent of offence punishable under Section 138 of NI Act.

9. Learned counsel for the Petitioner argues that the impugned judgment is manifestly erroneous and contrary to the law on the subject. Learned Trial Court failed to appreciate that Petitioner through several documents such as his complaint, dishonoured cheques, return memos and legal demand notice raised and established the dual presumptions under Section 139 of the NI Act which 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 of the NI Act for the discharge, in whole or in part, of any debt or other liability. Trial Court overlooked that Respondent admitted in his statement under Section 313 Cr.P.C. that he had signed the promissory note and the agreement as also that he had issued the cheques in question. Receipt of legal notice dated 09.08.2010 was also admitted by the Respondent at the time of framing of notice under Section 251 Cr.P.C. on 30.03.2011.



10. Learned Trial Court did not appreciate that the only moot question that remained to be examined was whether Respondent had paid back the money or not and if not, the same was payable. Trial Court was influenced by the coloured photocopies of the cheques produced by the Respondent, which were, in fact, false and fabricated and could not be proved by the Respondent. The only defence of the Respondent was that he had returned the money back under the cheques i.e., Rs.25 lacs, upon which Petitioner had returned the cheques purporting to be original but which finally turned out to be coloured photocopies. Nothing was produced by the Respondent either through documentary or oral evidence to prove that sum of Rs.25 lacs was returned to the Petitioner and in fact, Respondent stated in the evidence that he had not filed any written document to show re-payment/return of Rs.25 lacs to the Petitioner and had not filed any complaint to the police when he came to know that Petitioner had allegedly cheated him by giving him coloured photocopies in February, 2010.

11. Respondent as an afterthought created a false story that the money was returned to the Petitioner through his mother along with coloured photocopies of the cheques but was unable to decipher that the documents were not originals. This is a false plea and a mere afterthought. In his statement under Section 313 Cr.P.C., Respondent made no mention of his mother and significantly, upon receipt of legal notice demanding the money, Respondent did not respond. It is a natural human conduct that had the Respondent returned the money, he would have sent a response stating so and refuting the demand.

12. Learned Trial Court failed to appreciate that Respondent only made a bald statement that cheques were issued as security and/or the loan amount



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was repaid but led no evidence to corroborate the same, while on the other hand, Petitioner has a statutory presumption in his favour under Section 139 of NI Act in view of the admission of the Respondent that he had issued the cheques bearing his signatures, which were dishonoured. Petitioner proved receipt of legal notice by the Respondent and non-payment of the cheques amount within 15 days. Petitioner led evidence to show that the cheques were issued in discharge of an enforceable debt/liability and hence, there was no reason to acquit the Respondent. Reliance was placed on the judgment of this Court in *V.S. Yadav v. Reena, 2010 SCC OnLine Del 3294*. For the proposition that admission of signature on the cheque is sufficient to prove that the cheque in question was in discharge of legal liability, learned counsel relied on another judgment of this Court in *Jaipal Singh Rana v. Swaraj Pal Singh & Anr., 2008 SCC OnLine Del 253*.

13. Learned counsel for the Respondent urges that the Trial Court has rightly acquitted the Respondent. It is submitted that Respondent had taken a loan of Rs.25 lacs from the Petitioner for 6 months and executed a promissory note and an agreement as well as issued 7 signed blank cheques and documents pertaining to transfer of the property bearing No. A-240, Madanpur Khadar, New Delhi as security in respect of the loan. It was agreed that on repayment of loan in cash, Petitioner would return the cheques and property documents. However, even before the expiry of 6 months, Respondent returned the entire amount to the Petitioner in February, 2010, through his mother. At the time of return of money, Petitioner returned the cheques purportedly, originals. However, later in the evening, when Respondent's brother checked the documents, it was found that they were coloured photocopies of the originals. Loan agreement was never



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returned. Despite the payment of the loan amount, Petitioner misused the security cheques and filed the present complaint.

14. Learned counsel further submits that Respondent filed a civil suit against the Petitioner, his estranged wife Suman and two children, being Suit No. 383/2010 and certified copy of the plaint was exhibited as Ex.DW2/1 *albeit* the document was objected to by the Petitioner. Present complaint was filed as a counterblast to the civil suit. Petitioner is the brother-in-law of Respondent's estranged wife and acting in connivance with Respondent's wife and children and other relatives, deliberately returned only coloured photocopies instead of original documents so that Respondent could be implicated in a false case of dishonour of cheques. In fact, Respondent was not even aware that Petitioner had got signed two loan agreements for loan of Rs.25 lacs instead of one. Respondent signed the agreement only at page 1 of the agreement Ex.CW1/C-1 and at the time when the agreement was signed, witnesses had not signed in his presence on the second page Ex. CW1/C-2 and even the cheques details were not filled at that stage. Respondent learnt of the two agreements only when he received the legal notice in the present case.

15. Heard learned counsels for the Petitioner and the Respondent and examined their rival submissions.

16. Indisputably, Respondent has been acquitted by the learned Trial Court and therefore, the first issue that needs consideration is the scope and ambit of interference by an Appellate Court in a judgment acquitting the accused. Appellate Court has, no doubt, wide powers to re-appreciate the evidence in an appeal against acquittal and come to a different conclusion, on facts and law, but there is no gainsaying that this power must be



exercised with due care and caution since the presumption of innocence at the start of the trial is strengthened by acquittal of the accused by a judicial order. The Supreme Court in ***Ghurey Lal v. State of Uttar Pradesh, (2008) 10 SCC 450***, elucidated and crystallized the principles that the Courts are required keep in mind as guiding light, when deciding an appeal against a judgment of the Trial Court acquitting the accused and relevant passages from the said judgment are as under:-

“69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can re appreciate the entire evidence on record. It can review the Trial Court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial Court. The trial Court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the Trial Court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the Trial Court's acquittal:

1. The appellate court may only overrule or otherwise disturb the Trial Court's acquittal if it has “very substantial and compelling reasons” for doing so.

A number of instances arise in which the appellate court would have “very substantial and compelling reasons” to discard the trial court's decision. “Very substantial and compelling reasons” exist when:

(i) The Trial Court's conclusion with regard to the facts is palpably wrong;

(ii) The Trial Court's decision was based on an erroneous view of law;



(iii) *The Trial Court's judgment is likely to result in "grave miscarriage of justice";*

(iv) *The entire approach of the Trial Court in dealing with the evidence was patently illegal;*

(v) *The Trial Court's judgment was manifestly unjust and unreasonable;*

(vi) *The Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.*

(vii) *This list is intended to be illustrative, not exhaustive.*

2. *The appellate court must always give proper weight and consideration to the findings of the Trial Court.*

3. *If two reasonable views can be reached—one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused.*

71. *Had the well-settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate court's power is wide and extensive, it must be used with great care and caution."*

17. In ***Bannareddy and Others v. State of Karnataka and Others, 2018 SCC OnLine SC 289***, the Supreme Court observed as under:-

"10. Before we proceed further to peruse the finding of the High Court, it is relevant to discuss the power and jurisdiction of the High Court while interfering in an appeal against acquittal. It is well settled principle of law that the High Court should not interfere in the well-reasoned order of the Trial Court which has been arrived at after proper appreciation of the evidence. The High Court should give due regard to the findings and the conclusions reached by the trial court unless strong and compelling reasons exist in the evidence itself which can dislodge the findings itself. This principle has further been elucidated in Sambhaji Hindurao Deshmukh v. State of Maharashtra, (2008) 11 SCC 186 : (2009) 2 SCC (Cri) 464, SCC para 13, wherein this Court observed that : (SCC pp. 190-91)

"13. ... The High Court will interfere in appeals against acquittals, only where the Trial Court makes wrong assumptions of material facts or fails to appreciate the evidence properly. If two views are reasonably possible from the evidence on record, one favouring the accused and one against the accused, the High Court is not expected



to reverse the acquittal merely because it would have taken the view against the accused had it tried the case. The very fact that two views are possible makes it clear that the prosecution has not proved the guilt of the accused beyond reasonable doubt and consequently the accused is entitled to benefit of doubt....”

11. *It is not in dispute that the presumption of innocence is further reinforced, reaffirmed and strengthened against the acquitted accused by the judgment in his favour. (Vide Dara Singh v. Union of India, (2011) 2 SCC 490: (2011) 1 SCC (Cri) 706 (SCC in para 94.)”*

18. The Supreme Court in ***Mohd. Akhtar alias Kari and Others v. State of Bihar and Another***, (2019) 2 SCC 513, observed:-

“19.Interference with an order of acquittal is not permissible on the ground that a different view is possible. If the acquittal is justified on a probable view taken by the Trial Court, it should not be interfered with.....”

19. A Division Bench of this Court in ***State v. Kaishar Ali***, 2019 SCC OnLine Del 9875, held as under:-

“12. It is also settled law that any acquittal order cannot be lightly interfered with by the Appellate Court, though it has wide powers to review the evidence and to come to its own conclusion. The power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused.”

20. It would be relevant and useful to allude to the observations of this Court in ***Niraj v. Ramesh Pratap Singh @ Raju Singh***, 2012 SCC OnLine Del 3813, which are extracted hereunder for ready reference:-

“6. It is also well settled that the Appellate court should reverse an acquittal only for very substantial and compelling reasons. In the event, two views are possible on the evidence adduced before the Trial Court and the view taken by the Trial Court is a plausible view, the Appellate Court should not interfere and substitute its own view against the plausible view taken by the Trial Court. In fact, the Supreme Court in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 while referring to previous cases laid down the following general principles regarding the powers of appellate court while dealing an appeal against an order of acquittal:—



“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, ‘substantial and compelling reasons’, ‘good and sufficient grounds’, ‘very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of language’ to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court.”

7. The Supreme Court in a subsequent judgment in *Arulvelu v. State Represented by the Public Prosecutor*, (2009) 10 SCC 206 has held as under:—

“40. Unquestionably, the Appellate Court has power to review and re-appreciate the entire evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial Court is found to be perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallized by aforementioned judgments of this Court. The accused is presumed to be innocent until proven guilty. The accused



possessed this presumption when he was before the trial Court. The trial Court's acquittal bolsters the presumption that he is innocent. This fundamental principle must be kept in view while dealing with the judgments of acquittal passed by the trial Court.””

21. In the backdrop of these judgments, wherein law on interference by an Appellate Court in a judgment acquitting the accused has been crystallized, I may now proceed to examine the impugned judgment, basis the evidence on record, both oral and documentary and rival arguments of the parties.

22. Before proceeding, it would be important to refer to Section 138 of NI Act, which is extracted hereunder for ready reference:-

“Section 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 provision of this Act, be punished with imprisonment for 2[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, 3[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 of other liability means a legally enforceable debt or other liability.”



23. It is a settled law that in matters relating to dishonour of cheques, Courts have to consider whether the ingredients of Section 138 of NI Act are made out and if so, whether the accused is able to rebut the statutory presumption under Section 139 of NI Act. In ***Gimpex Private Limited v. Manoj Goel, (2022) 11 SCC 705***, the Supreme Court has delineated the ingredients which form the basis of an offence under Section 138 of NI Act as follows:

- “(i) The drawing of a cheque by person on an account maintained by him with the banker for the payment of any amount of money to another from that account;*
- (ii) The cheque being drawn for the discharge in whole or in part of any debt or other liability;*
- (iii) Presentation of the cheque to the bank arranged to be paid from that account;*
- (iv) The return of the cheque by the drawee bank as unpaid either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount;*
- (v) A notice by the payee or the holder in due course making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and*
- (vi) The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice.”*

24. In ***K.Bhaskaran v. Sankaran Vaidhyan Balan and Another, (1999) 7 SCC 510***, once again the constituent elements of the offence under Section 138 of NI Act were brought-forth as follows:

- “14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of*



the drawer to make payment within 15 days of the receipt of the notice.”

25. Dealing with and analysing the effect of presumption and shifting of onus of proof, the Supreme Court in ***Rajesh Jain v. Ajay Singh*, (2023) 10 SCC 148**, held as follows:

“33. The NI Act provides for two presumptions : Section 118 and Section 139. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that “unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability”. It will be seen that the “presumed fact” directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138.

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

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

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

37. As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to



transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.

38. *John Henry Wigmore on Evidence states as follows:*

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

39. *The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of “preponderance of probabilities”, similar to a defendant in a civil proceeding. [Rangappa v. Sri Mohan].*

40. *In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words “until the contrary is proved” occurring in Section 139 do not mean that the accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist. [Basalingappa v. Mudibasappa; see also Kumar Exports v. Sharma Carpets].*

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



Carpets].

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

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

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

26. Coming to the present case, the undisputed position that obtains is that Respondent admitted execution of promissory note Ex.CW1/B and agreement Ex.CW1/C as well as his signatures on 7 cheques in question Ex.CW1/E and Ex.CW1/H-1 to Ex.CW1/H-6. It is also established through cheque return memos dated 12.07.2010 and 06.08.2010, Ex.CW1/F and by Ex.CW1/I-1 to Ex.CW1/I-6, that on presentation with the bank, all 7



cheques were returned unpaid with remarks “*Funds Insufficient*”. The legal notice demanding the allegedly unpaid amount was dispatched to the accused within statutory period of 30 days is also established by the copy of the legal notice dated 09.08.2010, Ex.CW1/J and original postal receipts, AD Card and UPC, Ex.CW1/K, Ex.CW1/L and Ex.CW1/M. *Albeit* Respondent had disputed the receipt of the legal notice but the Trial Court has rendered a finding that the same was received by the Respondent and nothing has been shown to this Court to controvert this finding. In light of these admissions, the only question that the Trial Court posed to itself for examination was whether Respondent had any legally enforceable debt or liability to pay the allegedly due amount under the cheques in question to the Petitioner.

27. Having posed this question, learned Trial Court examined the effect of statutory presumption under Section 139 of NI Act and proceeding on the basis of evidence on record and in light of the judicial precedents, returned a finding that Petitioner failed to discharge the burden that had shifted on him in the given facts.

28. Before proceeding to test the impugned judgement, it would be useful to refer to Section 139 of NI Act which provides a presumption in favour of the holder of a cheque/negotiable instrument and is extracted hereunder:-

“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.”

29. Reading Section 139 and applying the same, there is little doubt that since Petitioner was the holder of the cheques in question and the signatures on the cheques were not denied by the Respondent, presumption shall be



drawn that the cheques were issued for discharge of a debt or other liability. The presumption under Section 139 of NI Act is, however, a rebuttable presumption. At this stage, I may allude to observations of the Supreme Court in ***Basalingappa v. Mudibasappa, (2019) 5 SCC 418***, wherein the Supreme Court, before proceeding to the judgments under Sections 118 and 139 of NI Act noticed 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. Relevant passage is as under:-

“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. A three-Judge Bench of this Court in Kali Ram v. State of H.P. laid down following:

“23. ... One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.”



30. In *Rangappa v. Sri Mohan*, (2010) 11 SCC 441, the Supreme Court observed that presumption under Section 139 of NI Act is rebuttable and it is open to the accused to raise a defence and contest that the cheque was not issued in furtherance of an enforceable debt or liability. It was also held that in the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden and therefore when an accused has to rebut the presumption under Section 139 of NI Act, the standard of proof for doing so is “*preponderance of probabilities*”. This implies that if the accused is able to raise a probable defence which creates doubt about the existence of a legally enforceable debt or liability, prosecution can fail. Relevant paragraphs are 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* 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.



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.”*

31. In light of these principles, it needs to be examined whether Respondent has succeeded in rebutting the presumption under Section 139 of NI Act. Respondent set up a defence that he had taken a loan of Rs.25 lacs from the Petitioner for 6 months and executed promissory note and agreement as also issued 7 signed blank cheques and documents pertaining to transfer of property but as security for the loan. It was agreed between the parties that repayment of loan would be in cash whereafter Petitioner would return the original cheques and property documents. Respondent's case was that he repaid Rs.25 lacs in cash to the Petitioner through his mother in February, 2010, but Petitioner instead of returning the original documents, deliberately and fraudulently handed over only coloured photocopies thereof to his mother, who was unable to discern the difference. Despite receiving the money, Petitioner misused the security cheques and filed the present complaint.

32. Respondent testified in his evidence that he had filed a suit against the Petitioner, who is the brother-in-law of his estranged wife; his wife and children and there being a family dispute, the complaint was a counterblast by the Petitioner. During cross-examination of the Petitioner, coloured photocopies of the cheques and the other documents pertaining to the sale of



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property were put to him but he evasively answered that he could not state anything about those documents. As noted by the Trial Court and rightly so, Petitioner never stated that the originals of the coloured photocopies were not executed. Trial Court notes that on 27.11.2009, documents such as the GPA Ex.CW1/D-7, agreement Ex.CW1/D-8, affidavit Ex.CW1/D-9 etc. were executed and attested by notary public and the agreement Ex.CW1/C and other documents record the loan transaction. It is expressly stated in the Agreement Ex.CW1/8 that Respondent had taken loan of Rs.25 lacs for 6 months and transferred the property along with handing over of physical possession and original documents. This document was neither disputed by the Petitioner nor any plausible reasoning came forth in his evidence for executing this document, if two separate transactions of sale of property and advancement of loan had taken place, which gives credence to the defence of the Respondent, as rightly noticed by the Trial Court.

33. Trial Court delved into another aspect of the matter. Petitioner admitted during his cross-examination that loan was to be repaid in cash failing which cheques would be presented, which implied that cheques were given as security in the eventuality of the Respondent failing to repay the loan within the agreed period. While Respondent took a clear defence that money was paid in cash through his mother, Petitioner while denying the receipt of the money in his cross-examination, admitted that the documents executed between the parties and attested by notary public on 27.11.2009 remained with him and the transfer documents of the property were handed over to his subsequent purchaser. A specific suggestion was put to the Petitioner that he had fraudulently handed over coloured photocopies to Respondent's mother but no explanation was offered by the Petitioner as to



how coloured photocopies reached the Respondent. Silence of the Petitioner on this aspect supports the defence of the Respondent that these were handed over by the Petitioner to Respondent's mother in the garb of returning the original documents.

34. Significantly, Trial Court notices that allegedly both payment for purchase of property as well as advancement of loan were done in cash on 27.11.2009, meaning thereby Petitioner had advanced Rs. 50 lacs in cash to the Respondent on the same date. In his cross-examination, when questioned about his financial capacity, Petitioner claimed that he had an annual income of approximately Rs.23.10 to Rs.25.10 lacs, in addition to funds after selling one of his properties *albeit* no evidence was produced to substantiate the stand. When questioned on the ownership of the property allegedly sold to collect funds, Petitioner admitted that the old haveli was of his father and the sale consideration was a contribution by his father, however, father was never examined to prove this stand and therefore rightly, Trial Court concluded that there were doubts on availability of Rs.50 lacs with the Petitioner on the relevant day. Trial Court also notes that Petitioner never produced his income tax return and/or failed to show the loan transaction in his ITR and relied on the judgment of this Court in ***Kulvinder Singh v. Kafeel Ahmed, 2013 SCC OnLine Del 34***, relevant paragraph of which reads as under:-

“7. The case of the petitioner in nutshell is that he had been approached by the respondent and he had advanced a loan of Rs. 9,30,000/- in the first instance. If such a huge amount of money is advanced as a loan to the respondent, the petitioner ought to have shown to the court concerned as to the source from where he had generated such a huge amount. In his examination/cross-examination, he states that he had sold his machinery but he failed to produce any record to that effect. He has not reflected the loan advanced to the respondent in his income-tax



return nor is he able to tell to the court the Ward in which the income-tax return is filed. The learned Magistrate has rightly placed reliance on the provisions of Section 269 SS of the Income-Tax Act wherein it is specifically laid down that if a loan is advanced which is more than Rs. 20,000/-, it has to be by way of writing reflected in the books of account but nothing of that sort has been done in the instant case. Obviously, this clearly creates a doubt regarding the truthfulness of the stand taken by the petitioner that he had advanced a loan of Rs. 9,30,000/- to the respondent.....”

35. In **Sanjay Mishra v. Kanishka Kapoor @ Nikki and Another, 2009 SCC OnLine Bom 290**, the Bombay High Court observed as under:-

“7.If in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in Income-Tax return or Books of Accounts of the complainant may be sufficient to rebut the presumption under section 139 of the said Act.”

36. In light of the above, the Trial Court acquitted the Respondent observing thus:-

“23. In the instant case, the alleged sale and loan transactions were unaccounted as complainant had transacted huge sum of Rs. 50 lacs and failed to reflect it in his Income Tax Return which raised doubt on the version of the complainant regarding separate sale and loan transactions.

24. In the background of the circumstances discussed herein above more specifically, the execution of agreements Ex. CW1/D-8 reflecting the execution of documents regarding transfer/sale of said property as security for loan of Rs.25 lacs, availability of color photocopy of documents executed on 27.11.2009 in the possession of the accused, without complainant having any explanation regarding the manner and occasion of accused availing the same, doubts over availability of funds to the extent of Rs.50 lacs with the complainant, failure of complainant to show the alleged two separate transaction of purchase of property and loan, raise doubts over the complainant version and defence of the accused appears to be probable. Consequently, presumption u/s 139 of the act stands rebutted.

25. Once presumption u/s 139 N.I. Act is rebutted, burden of proof shifts upon the complainant to prove his case as a matter of fact. As discussed above, the complainant has failed to prove existence of two separate transaction of sale/transfer of property and loan for Rs.25 lacs



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each and non payment by the accused towards the loan in question. Accused Kalyan Singh is accordingly acquitted of offence punishable u/s 138 of the Act.”

37. Having carefully gone through the evidence as noted above, this Court is unable to find any infirmity in the finding of the Trial Court that Respondent was able to set up a plausible defence, which on the principle of preponderance of probability, rebutted the presumption in favour of the Petitioner under Section 139 of NI Act. Execution of agreement Ex. CW1/D-8 reflecting the execution of documents regarding transfer/sale of the property as security for loan of Rs.25 lacs; Respondent being in possession of the coloured photocopies of the documents executed on 27.11.2009 coupled with absence of any explanation by the Petitioner on how these were with the Respondent; doubts over availability of funds to the extent of Rs.50 lacs with the Petitioner; his failure to prove the alleged two separate transactions of purchase of property and loan, certainly raises doubts over Petitioner's version and defence of the Respondent appears to be a probable defence. Consequently, presumption under Section 139 of the NI Act stands rebutted. Once presumption under Section 139 was rebutted by the Respondent, burden of proof shifted on the Petitioner and as held by the learned Trial Court, Petitioner was unable to discharge the burden and, in my view, the Respondent was rightly acquitted of the offence punishable under Section 138 of NI Act. Thus, no ground for grant of leave to appeal is made out.

38. Petition seeking leave to appeal is hereby dismissed.

JYOTI SINGH, J

JULY 31, 2024/DU/shivam